The Problematic Structure of Indigent Defense Delivery

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Available at: https://repository.law.umich.edu/mlr/vol122/iss2/3

https://doi.org/10.36644/mlr.122.2.problematic

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THE PROBLEMATIC STRUCTURE OF INDIGENT DEFENSE DELIVERY

Eve Brensike Primus*

The national conversation about criminal justice reform largely ignores the critical need for structural reforms in the provision of indigent defense. In most parts of the country, decisions about how to structure the provision of indigent defense are made at the local level, resulting in a fragmented patchwork of different indigent defense delivery systems. In most counties, if an indigent criminal defendant gets representation at all, it comes from assigned counsel or flat-fee contract lawyers rather than public defenders. In those assigned-counsel and flat-fee contract systems, the lawyers representing indigent defendants have financial incentives to get rid of assigned criminal cases as quickly as possible. Those incentives fuel mass incarceration because the lawyers put less time into each case than their public defender counterparts and achieve poorer outcomes for their clients. Moreover, empirical research shows that assigned-counsel and flat-fee contract systems are economically more costly to the public fisc than public defender systems.

This Article collects data from across the country to show how prevalent assigned-counsel and contract systems remain, explains why arguments in favor of substantial reliance on the private bar to provide for indigent defense are outdated, argues that more states need to move toward state-structured public defender models, and outlines how it is politically possible for stakeholders to get there.

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doi:10.36644/mlr.122.2.problematic
The adversarial system only works if there are two well-equipped and motivated sides: the prosecutor who brings the charges and the defender who fights against them. Given evidence that our criminal system is fundamentally
broken—that we are imprisoning innocent people, targeting racial minorities for differential treatment, and giving people excessively long sentences—it is fair to ask whether the adversarial system is working properly. In recent years, policymakers and politicians have recognized the need for reform, and they have focused on initiatives to elect progressive prosecutors, reform police departments, end cash bail, decriminalize offenses, enact sentencing reform, and push for a more diverse judiciary. All of these are important movements with the potential to address and improve some of the criminal system’s problems. But the conversation about criminal justice reform remains incomplete because it has largely ignored the need for and importance of indigent defense reform.

In most places in this country, poor people accused of committing crimes do not receive professional assistance from a full-time public defender who is directly employed by the government and paid an annual salary for their legal services. Public defenders are often the exception rather than the rule, even


7. E.g., Alexandra Natapoff, MISDEMEANOR DECRIMINALIZATION, 68 VAND. L. REV. 1055, 1058 (2015) (“Commentators on the left and right, the American Bar Association (‘ABA’), the National Association of Criminal Defense Lawyers (‘NACDL’), and numerous scholars have called for decriminalizing minor offenses as a solution to a wide array of systemic problems.”).


10. There are a few notable exceptions to the lack of attention paid to indigent defense. Kyung Lah, Kamala Harris To Introduce Legislation Aimed at Aiding Public Defenders, CNN (May 8, 2019, 5:00 AM), https://www.cnn.com/2019/05/08/politics/kamala-harris-public-defender-bill/index.html [perma.cc/559Y-A2W9] (describing how Vice President Harris proposed legislation to aid indigent defenders when she was a senator); see also JONATHAN RAPPING, GIDEON’S PROMISE: A PUBLIC DEFENDER MOVEMENT TO TRANSFORM CRIMINAL JUSTICE 199 (2020) (arguing that a focus on public defenders is necessary to make transformative change).

11. See infra Part IV; Appendix A.
though approximately 80% of the people accused of committing crimes in this country cannot afford to hire counsel.\textsuperscript{12} For many indigent defendants, if they get representation at all, it comes from assigned counsel or flat-fee contract lawyers who may not have much criminal defense experience and who often have financial incentives to get rid of assigned criminal cases as quickly as possible.\textsuperscript{13}

In flat-fee contract systems, defense attorneys are paid a set fee to handle all or a portion of a jurisdiction’s indigent defense cases, or they are paid by the case or by the event (for example, $200 for a plea or $500 for a trial).\textsuperscript{14} Either way, they have no financial incentive to go to trial, do legal research, or investigate. The flat fees are typically so low that attorneys often have to seek other employment to supplement their incomes, which only detracts from the amount of time they have for their indigent defense cases.\textsuperscript{15} “[W]ith high case-loads, no real oversight, and no financial incentive to take cases to trial, these [contract attorneys] have every incentive to plead out their cases as quickly as possible.”\textsuperscript{16}

The same incentives exist for lawyers who work in assigned-counsel systems. Assigned counsel are dispersed, part-time, appointed attorneys who are typically paid an abysmally low hourly rate and often face low fee caps that they will quickly meet in each case.\textsuperscript{17} Once they reach the fee cap, they too are financially better off pleading out a case, getting their fee, and getting a new client.

Assigned-counsel and flat-fee contract systems fuel mass incarceration.\textsuperscript{18} Although there are certainly some excellent attorneys who work in these systems, empirical research shows that contract and assigned-counsel system lawyers, as a whole, put less time into indigent defense representation than their public defender counterparts, and they achieve poorer outcomes for their clients, including fewer dismissals, deferred sentences, and acquittals, as well

\textsuperscript{12} See CAROLINE WOLF HARLOW, BUREAU OF JUST. STATS., U.S. DEP’T OF JUST., DEFENSE COUNSEL IN CRIMINAL CASES 5 (2000).


\textsuperscript{14} See, e.g., DUVAL, JIM HOGG AND STARR DISTRICT COURT ATTORNEY FEE SCHEDULE (2010), http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=236 (to download, click the Duval Jim Hogg Starr District and Country Court Attorney Fee Schedule.docx “view” link at the bottom of the page) [perma.cc/TU46-Q69H].

\textsuperscript{15} Eve Brensike Primus, Culture as a Structural Problem in Indigent Defense, 100 MINN. L. REV. 1769, 1774 (2016); see infra Section II.A.

\textsuperscript{16} Primus, supra note 15, at 1775. This Article refers to contract attorneys to describe attorneys who work as independent contractors for a set fee per case, per event, per docket, or per court. Thus, public defenders with full-time employment contracts are not contract attorneys. State and local governments often resort to flat-fee contracts as cost-saving measures and dole out these contracts to the lowest bidders, which creates perverse financial incentives for the attorneys and pits their financial interests against their clients’ interests in zealous advocacy. See infra Section II.A.

\textsuperscript{17} See Appendix B.

\textsuperscript{18} See infra Part III.
as longer prison sentences.\textsuperscript{19} Assigned-counsel and flat-fee contract systems are also more expensive in the long term than institutional public defender systems.\textsuperscript{20} Yet, despite this research, every state continues to rely on assigned-counsel and/or contract systems. My research suggests that, nationally, a third to a half of the poor people accused of committing crimes in many states are represented by assigned counsel or flat-fee contract lawyers.\textsuperscript{21} And in some states—including some of the country’s most populous states and some of its most liberal-leaning states—the numbers are even higher.\textsuperscript{22} For example, in Texas and Massachusetts, more than three quarters of the poor people accused of committing crimes do not receive assistance from a full-time public defender.\textsuperscript{23} On the numbers, more counties in this country rely on assigned-counsel or flat-fee contract systems than full-time public defender offices.\textsuperscript{24}

In this Article, I will explain why states’ choices about how to structure indigent defense delivery systems matter and how those choices have downstream consequences for the legitimacy and efficacy of the system. In the first Part, I explore how the U.S. Supreme Court delegated responsibility for structuring indigent defense delivery systems to the states and describe how many states, in turn, delegated that responsibility to counties and municipalities. The result is a fragmented patchwork of different indigent defense systems across the country where the quality of the representation provided to a poor person accused of committing a crime depends more on geography than anything else.

In the second Part, I explain the three different structural approaches that states and localities have taken to providing indigent defense, and I explore the differences between flat-fee contract systems, assigned-counsel programs, and public defender models. In the third Part, I explain why these different indigent defense delivery systems are not created equal. A plethora of recent empirical research has shown that public defender models are structurally superior to and less expensive than assigned-counsel and contract systems. In Part IV, I explain using primary research just how prevalent assigned-counsel and contract systems are in this country and explore why there is so much reliance on these systems, even in the face of empirical research that they are

\textsuperscript{19} See infra Section III.A.
\textsuperscript{20} See infra Section III.B.
\textsuperscript{21} See Appendix A.
\textsuperscript{22} See id.
\textsuperscript{23} See id.
inferior. Finally, in Part V, I discuss why the reasons cited in support of substantial reliance on the private bar to provide for indigent defense are outdated, argue that more states need to move toward state-structured public defender models, and explain how it is politically possible for stakeholders to get there.

I. STRUCTURAL DELEGATIONS

In 1963, the Supreme Court held in *Gideon v. Wainwright* that the Sixth Amendment right to counsel in criminal cases required states to appoint counsel when a person accused of committing a felony could not afford to retain counsel, but the Court did not require any particular method of appointment. The Court remained silent about how federal and state governments should provide for appointed counsel even as it extended the right to appointed counsel to alleged misdemeanants facing actual imprisonment upon conviction, to criminal defendants on their first appeals as of right, and to juveniles facing delinquency proceedings that result in a loss of freedom.

Prior to *Gideon*, if courts provided an indigent criminal defendant with counsel at all, they typically did so as part of what Professor Sara Mayeux has called the “charity” model of indigent defense representation. Courts would rely on lawyers’ professional obligations to provide pro bono representation and encourage (or some might say coerce) members of the bar to contribute their time and expertise. If these volunteer lawyers were paid, it was an extremely low amount. Although there were some cities where professional public defender offices existed, full-time public defenders were rare when *Gideon* was decided.

The United States Congress responded to *Gideon*’s judicial mandate by passing the Criminal Justice Act of 1964 (CJA), which required federal district courts to adopt local plans for furnishing counsel to indigent defendants in federal cases. Most plans included either a federal public defender organization (a governmental entity in the judicial branch) or a community defender organization (a private, nonprofit organization) with full-time public defense employees to represent the indigent accused. But the CJA also envisioned a robust role for court-approved private attorneys to handle a substantial portion of indigent defense cases. Each federal district created a CJA Panel—a list of qualified private attorneys available to handle indigent defense cases at a set

30. See *id.* at 29.
31. See *id.* at 30.
hourly rate. Nowadays, private assigned counsel represent 40% of indigent people accused of jailable federal criminal offenses nationwide, with federal public defenders representing 60%.\footnote{33}{Defender Services, U.S. CTS, https://www.uscourts.gov/services-forms/defender-services[perma.cc/V8RW-JF9L]. Today, ninety-one of the ninety-four federal judicial districts provide indigent defense through a combination of public defender organizations and assigned-counsel programs. Three districts rely entirely on the CJA Panel of private attorneys to provide indigent defense. \textit{See id.}}

At the state level, some states responded to \textit{Gideon} by creating statewide public defender programs.\footnote{34}{See infra Section II.C.} Others built on the assigned-counsel systems that existed prior to \textit{Gideon} and appointed private counsel on a case-by-case basis, paying them per hour, per case, or per event in a case.\footnote{35}{Eve Brensike Primus, \textit{Defense Counsel and Public Defense}, in 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 121, 123 (Erik Luna ed., 2017); \textit{see infra} Section II.B.} Some states contracted with private attorneys, law firms, or nonprofit groups and agreed to pay them flat fees to represent indigent defendants.\footnote{36}{Primus, \textit{supra} note 35; \textit{see infra} Section II.A.} And a number of states satisfied the obligation to provide for indigent defense by relying on a combination of public defender offices, assigned-counsel programs, and contract systems.\footnote{37}{Primus, \textit{supra} note 35; \textit{see Appendix A}(collecting information about delivery models in all fifty states).}

To further complicate matters, the majority of states refused to organize indigent defense delivery services at the state level. Instead, they passed the responsibility on to their respective counties, resulting in a patchwork of different indigent defense delivery systems within those states. As Appendix A shows, only sixteen states organize indigent defense delivery entirely at the state level. Fifteen other states have adopted a mixed approach under which the state structures indigent defense representation for certain kinds of cases or for certain geographic areas within the state but local governments structure indigent defense for the rest of the system.

In Kansas and New Jersey, for example, the state organizes indigent defense delivery at the state level for felonies, but leaves it to localities to structure representation in misdemeanor cases.\footnote{38}{See KAN. STAT. ANN. §§ 22-4501 to 22-4529 (2007); KAN. ADMIN. REGS. §§ 105-1-1 to 105-31-6 (2022); N.J. STAT. ANN. §§ 2A:158A-1 to 2A:158A-24 (West 2011 & 2023 Supp.), 2B:24-1 to 24-17 (West 2023).} Other states—like Alaska and Colorado—have statewide indigent defense delivery systems that handle everything except for jailable municipal ordinance offenses, which are left to the different municipalities.\footnote{39}{\textit{See}, e.g., MAREA BEEMAN, ROSALIE JOY & MICHAEL MROZINSKI, NAT'L LEGAL AID & DEF. ASS'N, REVIEW OF THE AURORA, COLORADO MUNICIPAL PUBLIC DEFENSE SYSTEM 16–17 (2021); Andrew Wellner, \textit{Anchorage Contract More than Doubles Law Firm's Size}, MAT-SU VALLEY FRONTIERSMAN (Dec. 14, 2013), https://www.frontiersman.com/business/anchorage-contract-more-than-doubles-law-firm-s-size/article_bdbf7696-652b-11e3-b81b-001a4bdc87f.html[perma.cc/8T7D-CZ92].} In Florida, each local circuit structures primary indigent defense representation for that jurisdiction, but the state provides a
structure for indigent defense representation when there are conflicts of interest. And in Kentucky, Nevada, New York, Ohio, and Oklahoma, the state structures how indigent defense is provided in some, but not all, cities and counties. The remaining nineteen states—which include many of the most populous states like California, Texas, Pennsylvania, Illinois, Georgia, North Carolina, and Michigan—structure indigent defense delivery systems entirely at the local level. This means that, for many defendants, the quality and type of legal assistance they receive depends on where they live.

II. DIFFERENT INDIGENT DEFENSE DELIVERY MODELS

There are a number of different ways states and localities assign cases to and compensate indigent defense attorneys for their work. The incentives and support structures of these different delivery systems vary dramatically. In this Part, I discuss the differences between flat-fee contract models, assigned-counsel systems, and public defender offices.

A. Flat-Fee Contracts

A number of jurisdictions hire private counsel using flat-fee contracts to provide for indigent defense representation. These contracts exist in a number of different forms. Under some flat-fee contracts, a private lawyer (or group of lawyers) agrees to handle the entire indigent defense caseload in a county or courthouse for a flat, agreed-upon fee. Under other contracts, the attorney (or group) agrees to handle all cases of a specific type in the courthouse or county in exchange for the flat fee—for example, a flat-fee contract to handle all misdemeanor cases. Still other flat-fee contracts pay attorneys a lump sum to handle a specific number of cases during the contract period.

One thing that is common to all of these flat-fee arrangements is that attorneys get the same compensation regardless of how much time and effort each case requires. Financially, they are better off when they dispose of cases quickly because they do not receive additional money when they put more time and effort into a case. This creates an inherent conflict between contract attorneys’ financial interests and their ethical obligations to competently defend their clients.

In addition to the financial pressure to dispose of cases quickly, the high caseloads that contract attorneys are often forced to handle put additional

41. See Appendix A.
42. See Appendix A.
43. Romero, supra note 13, at 1090–91.
44. Id. at 1112–13 (noting the financial conflicts of interest that exist with low-bid contracting). See generally Roger A. Fairfax, Jr., Outsourcing Criminal Prosecution?: The Limits of Criminal Justice Privatization, 2010 U. CHI. LEGAL F. 265 (discussing the problems of privatization).
pressure on them to dispose of cases without adequate preparation. For example, one California misdemeanor contract attorney had 250–300 cases a month as part of a flat-fee contract. With an average of twenty-two work days a month, this attorney was handling between eleven and fourteen cases each day. It is impossible to interview clients, investigate cases, research the law, and prepare effective defense strategies with so many cases.

States and localities typically resort to flat-fee contracts to save money. The right to appointed counsel has always been an unfunded mandate. States that had not been appointing counsel to the indigent accused found themselves saddled with a large financial responsibility in the 1960s and 1970s when the Supreme Court recognized a right to appointed counsel in felony and jailable misdemeanor cases. At the same time, President Nixon announced the "War on Drugs," which resulted in a huge proliferation in federal and state criminal codes and a large investment in law enforcement. Many states began looking for ways to provide indigent defense representation “on the cheap,” and contract systems seemed the perfect solution. State and local governments could award flat-fee contracts to handle indigent defense representation to the lowest bidders and save money.

Contract systems grew in popularity in the 1970s and early 1980s. By 1986, contracts accounted for about 11% of all defender services in the country, and several states—including Arizona, Idaho, Kentucky, North Dakota, Oregon, and Washington—relied on contracts for the majority of indigent defense representation in serious criminal cases. By 2013, at least twenty states were using flat-fee contracts to provide indigent defense services.

But you get what you pay for, and flat-fee contracts don’t pay for much. Often, the amount paid is not enough for the contracting lawyers to make a living wage. This means contract attorneys typically have to take on multiple contracts, and/or private work in addition to their indigent defense contract work, to make enough money to support themselves and their families. And

45. ROBERT L. SPANGENBERG ET AL., SPANGENBERG GRP., CONTRACTING FOR INDIGENT DEFENSE SERVICES 1 (2000) [hereinafter CONTRACTING].

46. ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEF. SERVS. § 5-3.1 cmt., at 45–46 (3d ed. 1992) [hereinafter 1992 ABA STANDARDS] (noting one of the main reasons for increased use of contracts was to control costs).


48. See 1992 ABA STANDARDS, supra note 46, § 5-3.1 cmt., at 45.

49. See id. at 45–46.


51. See Romero, supra note 13, at 1113–14 (noting that defense counsel sometimes “amass several public defender contracts within a region of their state”).
this structure does not leave them with enough time and resources to adequately represent their clients.

For example, in Louisiana’s 11th and 42nd Districts, contract attorneys earn between $4,000 and $7,000 per month, which translates to $48,000–84,000 per year.\(^2\) In Washington County, Utah, contract attorneys earn $58,000 a year.\(^3\) On their face, these might seem like decent salaries. But contract counsel are not state or county employees, so they don’t get government benefits.\(^4\) As a result, these attorneys have to purchase their own benefits packages. And because they are independent contractors, they have to pay self-employment taxes on the flat fees that they earn, which further reduces their take-home pay.

In addition, flat-fee contracts are presumed to include the costs of any overhead expenses associated with running one’s own law practice, including the cost of reference materials, legal research database licenses, office equipment, rent, travel, malpractice insurance, continuing legal education and training, and potential student loan debt.\(^5\) According to a 2020 report, the median overhead costs per attorney in Indiana are $54,455 a year, but the median amount paid to contract attorneys in Indiana is $64,777 a year.\(^6\) Indiana contract defense attorneys effectively earn $10,322 in yearly compensation, which translates to $5.16 per hour based on a forty-hour work week.\(^7\) Or consider Montana, where an indigent defense contractor’s flat-fee contract meant that he effectively earned $18 per hour with no compensation for overhead in exchange for an agreement to handle 100 felony and 250 misdemeanor cases.\(^8\) Another attorney in rural Utah handled the entire misdemeanor docket in one jurisdiction for $600 per month.\(^9\) In 2013, that docket included 246 cases, which meant that he was paid less than $30 per case.\(^10\)

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54. See, e.g., LA. PUB. DEF. Bd., LPDB 2021 ANNUAL BOARD REPORT 74, 90, 106, 124, 157, 173, 190, 207, 224, 239, 342, 449, 503, 519, 607, 624, 640, 673, 689, 705, 763 (2022) (noting that twenty-two of the forty-two districts don’t provide medical benefits to attorneys who contract to provide indigent defense representation).

55. MICH. INDIGENT DEF. COMM’N, INCENTIVIZING QUALITY INDIGENT DEFENSE REPRESENTATION 5 (2018) [hereinafter INCENTIVIZING QUALITY].

56. IND. PUB. DEF. COMM’N, INDIANA PUBLIC DEFENSE OVERHEAD COSTS 5 (2020) [hereinafter INDIANA OVERHEAD].

57. Id.

58. CONTRACTING, supra note 45, at 15.


60. Id.
In addition to covering overhead costs, these flat-fee amounts are also supposed to cover the costs associated with hiring support personnel, including legal assistants, paralegals, investigators, and social workers. The National Association for Public Defense recognizes that investigators, mental health professionals, paralegals, and administrative assistants provide essential support for indigent defense. Investigators and social workers have skills and expertise that attorneys lack. For this reason, the American Bar Association’s Standards for Criminal Defense state that indigent defense delivery systems “should provide for investigatory, expert, and other services necessary to quality legal representation.” But, with contract payments as low as I’ve described, investigation and support services remain unattainable luxuries for many indigent defense clients in contract systems. Contract attorneys often can’t afford help. And even if they could, they are financially incentivized not to hire assistance. After all, any money spent on personnel to help research, organize, or investigate cases reduces the contract lawyer’s already small take-home pay and prolongs the time spent on a case. So, in practice, many contract attorneys around the country work alone and don’t hire any support personnel. For example, a 2016 report analyzing indigent defense delivery systems


63. NICHOLAS M. PACE ET AL., RAND CORP., PROVISIONAL CASELOAD STANDARDS FOR THE INDIGENT DEFENSE OF ADULT CRIMINAL AND JUVENILE DELINQUENCY CASES IN UTAH 36 (2021) [hereinafter RAND UTAH REPORT], https://www.rand.org/content/dam/rand/pubs/research_reports/RRA1200/RRA1241-1/RAND_RRA1241-1.pdf [perma.cc/MH2S-VKK5] (noting that 44% of contract attorneys worked in single-person offices, 18% had no support staff of any kind, and over 30% did not use investigators); SIXTH AMEND. CTR., THE RIGHT TO COUNSEL IN MISSISSIPPI: EVALUATION OF ADULT FELONY TRIAL LEVEL INDIGENT DEFENSE SERVICES 90 (2018) [hereinafter MISSISSIPPI REPORT], https://sixthamendment.org/6AC/6AC_mississippi_report_2018.pdf [perma.cc/JG46-5JPW] (noting that defenders often lack social workers, paralegals, and investigators); SIXTH AMEND. CTR., THE RIGHT TO COUNSEL IN ILLINOIS: EVALUATION OF ADULT CRIMINAL TRIAL-LEVEL INDIGENT DEFENSE SERVICES 34–36, 74–75 (2021) [hereinafter ILLINOIS REPORT], https://sixthamendment.org/6AC/6AC_illinois_report_2021.pdf [perma.cc/XV2X-PRE2] (noting several counties in which defenders have no support staff); SIXTH AMEND. CTR., THE RIGHT TO COUNSEL IN INDIANA: EVALUATION OF TRIAL LEVEL INDIGENT DEFENSE SERVICES 184 (2016) [hereinafter INDIANA REPORT], https://sixthamendment.org/6ac/6AC_indianareport.pdf [perma.cc/YE54-EWPN] (“There is no indication that the [contract] attorneys ever use investigators in their indigent clients’ cases, nor for that matter that they perform any investigation themselves.”); INDIANA OVERHEAD, supra note 56, at 6 (finding that 44% of contract attorneys reported not having enough support staff and 14% had no support staff); AM. BAR ASS’N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, THE INDIANA PROJECT: AN ANALYSIS OF THE INDIANA PUBLIC DEFENSE SYSTEM AND ATTORNEY WORKLOAD STANDARDS 32 (2020) [hereinafter INDIANA PROJECT], https://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/ls_sclaid_public_defense_indiana_project_report_july_2020.pdf [perma.cc/S22A-WGPK] (finding that more than 75% of Indiana attorneys handling indigent defense cases do not have adequate support staff).
in Indiana noted that, in one county, “[t]here is no indication that the [contract] attorneys ever use investigators in their indigent clients’ cases, nor for that matter that they perform any investigation themselves.” As one contract defender in another county put it, “I’m reliant on my clients to act as investigator . . . I tell my clients, ‘If you have witnesses, get them here!’”

The high caseloads that contract attorneys handle, coupled with the failure to engage support personnel, compromises the quality of the representation that defense attorneys provide in ways that may violate both the constitutional rights of defendants and the ethical obligations of attorneys. The U.S. Supreme Court and lower state and federal courts have repeatedly held that defense attorneys have performed deficiently under the Constitution when defense counsel fails to investigate cases pretrial. In 2018, flat-fee contract defenders in Maine’s Somerset County spent, on average, 2.99 hours per case when working on adult criminal cases, including felonies. Spending less than three hours on a felony does not give an attorney enough time to interview a client, investigate the facts, research the law, file appropriate motions, negotiate with the prosecutor, appear in court for hearings, and prepare a case for trial or a plea followed by a sentencing hearing.

Defense attorneys are also ethically prohibited from investigating their own cases when that investigation can turn them into witnesses at a later trial. If a defense attorney interviews the complaining witness in a criminal case and that witness later testifies at trial in a way that is inconsistent with what she earlier told the defense attorney, the defense attorney would have to withdraw from the representation and become a witness in the case to expose the contradiction. The use of investigators avoids these ethical problems. Yet many contractors cannot afford to hire them given the low fees they are paid.

64. INDIANA REPORT, supra note 63, at 184.
65. Id. at 168.
68. See MODEL RULES OF PRO. CONDUCT r. 3.7 (AM. BAR ASS’N 1983).
Because it is impossible for most flat-fee contract lawyers to make a living wage, they have to find ways to supplement their incomes. Some attorneys sign multiple contracts for indigent defense representation in different courts or jurisdictions, which only increases their already-problematic caseloads. For example, one attorney in American Fork, Utah handled 700 misdemeanors pursuant to a flat-fee contract. Assuming a forty-hour work week without any time off for illness, vacation, or holidays, that translates to 2.9 hours per case. But this attorney also contracts with five other courts, including one where he has another 348 misdemeanor cases. In total, each year the lawyer handles more than 1,200 misdemeanor and traffic cases before nine district and justice courts scattered across Utah County and has only 1.7 hours available per case.

Many contract attorneys find ways to supplement their contract earnings with other kinds of legal or nonlegal work, which only further reduces the amount of time that they have to spend working on their indigent clients' cases. A 2014 report on Delaware’s indigent defense delivery system explained how lawyers in New Castle County handled 430 indigent defense cases a year while still maintaining private practices to make ends meet. At times, they had caseloads that exceeded 1,000 misdemeanor cases a year. No attorney can effectively handle that many cases a year, even working full-time only on indigent defense cases. In New Castle County, these attorneys are handling.

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al+Advocacy+Program/Ethics_-_Rapping.pdf [perma.cc/2H4K-4Y29].


71. SIXTH AMENDMENT CENTER UTAH REPORT, supra note 59, at 82.

72. Id.

73. Id.

74. Id. at v.


76. Id.

77. The National Advisory Commission on Criminal Justice Standards and Goals (NAC) until recently provided for a maximum caseload per year of 150 felonies, 400 misdemeanors, 200 juvenile cases, 200 mental health cases, or 25 appeals. ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 5 n.19 (2002) [hereinafter TEN PRINCIPLES], https://www.nacdl.org/getattachment/49867dc1-1655-4337-9dcf-ce095ce544e8/aba-ten-principles.pdf [perma.cc/BW5Z-VMCG]. As this Article was going to print, the RAND Corporation, the National Center for State Courts, the American Bar Association Standing Committee on Legal Aid and Indigent Defense, and Stephen F. Hanlon released new National Public Defense Workload Standards to replace the outdated 1973 NAC standards. The new workload standards break criminal trial-level offenses into eleven different categories and, based on seventeen state-level public defense workload studies and input from a national panel of defense experts, issue guidance on the number of hours a defense attorney should spend on a case in each category. NICHOLAS M. PACE ET AL., NATIONAL PUBLIC DEFENSE
private cases *in addition* to their high indigent defense caseloads because of the need to supplement their incomes.

According to one chief defender in Louisiana, a contract defender in her district works full-time for the East Louisiana Mental Health System and does her indigent defense work on top of that job.78 As another chief defender in Louisiana put it, all of the contract defense attorneys in his district “rely on their private practice for their primary income.”79 One Utah contract attorney admitted that, without a private practice, they would not have enough income to pay for their family’s medical expenses.80 Another shared that the flat-fee contract payments are so low that they often can’t afford gas to drive and visit clients at the jail.81

Systems that require indigent defense attorneys to maintain private practices to survive pit attorneys’ financial interests against clients’ interests in effective preparation and advocacy. In private cases, attorneys are paid by the hour with no cap on how much they can earn, which gives them a financial incentive to spend time on private cases instead of contract cases. Every additional hour an attorney spends on indigent defense is a lost opportunity to earn an hourly fee from a paying client. This means that attorneys often don’t have time to investigate and research their indigent defense cases. In other words, the flat-fee contract system is structurally set up to disadvantage indigent criminal clients. As attorneys gain experience and are able to get more private clients and make better money that way, many stop contracting, leaving indigent defense representation to inexperienced attorneys who might be even less effective.82

In some jurisdictions, the incentives are more perverse because attorneys get a flat fee *per case*, which means they can make more money if they churn through cases quickly. An attorney getting paid a flat rate to handle all the cases in a jurisdiction has a monetary incentive to get through the cases they already have quickly, and also has an interest in being appointed to as few cases as possible because they are paid the same rate regardless of the number of cases. In contrast, an attorney who is paid a flat rate per case is financially

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80. RAND UTAH REPORT, supra note 63, at 68.
81. See id.
interested both in disposing of the cases quickly (because they are paid the same rate for each case regardless of how much work they put into the case) and in contemporaneously seeking appointment in as many cases as possible (because they are paid by the case). The abysmally low flat rates in many jurisdictions encourage contract attorneys to take an unreasonable number of cases to make ends meet. Here is just a sample of how low the flat fees per case are when it comes to misdemeanor assignments:

**Table 1: Sample Rates for Handling Misdemeanor Criminal Cases**

<table>
<thead>
<tr>
<th>State</th>
<th>Rate for Handling a Misdemeanor Criminal Case</th>
</tr>
</thead>
<tbody>
<tr>
<td>Virginia</td>
<td>$158 maximum</td>
</tr>
<tr>
<td>New Mexico</td>
<td>$180 flat rate</td>
</tr>
<tr>
<td>North Dakota</td>
<td>$300 maximum</td>
</tr>
<tr>
<td>Connecticut</td>
<td>$350 maximum</td>
</tr>
<tr>
<td>Missouri</td>
<td>$375 flat rate</td>
</tr>
<tr>
<td>Florida</td>
<td>$400 flat rate</td>
</tr>
<tr>
<td>Arizona</td>
<td>$200–450 flat rates</td>
</tr>
<tr>
<td>Texas</td>
<td>$400–500 flat rates</td>
</tr>
</tbody>
</table>

Nor are these problems limited to misdemeanor cases. According to a 2018 report, attorneys in central Michigan earned a flat sum of $300 per felony case. Lawyers who work in these systems concede that the low compensation affects the quality of the representation. One Texas attorney admitted that he would meet with his clients more regularly if he were paid by the hour, but said that if “[y]ou’re only getting paid $400 or $500” for handling a misdemeanor case, “how often are you going to meet with your client?”

Oregon runs its statewide indigent defense delivery system on flat-fee contracts. Until 2021, the state relied on contracts that essentially paid a flat fee per case, which created incentives for the contracting attorneys to take on as

83. See Appendix B (collecting data and sources for each state).
86. The contracts actually paid a flat fee per “credit” and each case was assigned a number of “credits” depending on the charges and complexity. *Sixth Amend. Ctr., The Right to Counsel in Oregon: Evaluation of Trial Level Public Defense Representation Provided Through the Office of Public Defense Services* 120–21 (2019) [hereinafter Oregon Report], https://sixthamendment.org/6AC/6AC_Oregon_report_2019.pdf [perma.cc/SG2P-HU75]. The financial incentives are the same. Each attorney gets a flat fee for
many cases as possible to earn more money, regardless of whether they had enough time to handle the cases properly.\(^87\) One Oregon attorney reported that he was paid $290 per case under a municipal contract, which meant that he made “maybe . . . $5 an hour” in a misdemeanor weapon case that went to trial.\(^88\) Another attorney in the state system admitted that flat-fee payments “encourage us [collectively] to take as many cases as possible, instead of encouraging us to work our cases effectively.”\(^89\)

Sometimes states graduate flat fees depending on the type of case or court, but this often creates additional conflicts of interest between the attorney’s financial interests and the client’s interests. As one Michigan attorney explained, attorneys sometimes have a financial incentive to prevent a client’s case from being dismissed in district court at a first appearance.\(^90\) In the jurisdiction where this attorney practiced, attorneys were paid $50 for a dismissal in district court.\(^91\) But, if the case was held and sent over to circuit court where more serious cases are handled, the attorney would receive $460 for a low-level felony or $800 for an upper-level felony.\(^92\) In that system, attorneys are financially better off when their clients are held and moved to circuit court even though it is obviously worse for the clients to be held longer.

handling a certain number of credits, which translates into a flat fee per case. The contractors get paid more for handling more credits, which means that they get more if they take more cases.

87. Id. at 155–56. In 2021, Oregon changed its system to a “per attorney” rate on the understanding that each attorney would handle 115% of the now-outdated ABA-recommended caseloads. This translates to paying about $210,000 for 173 felonies or 460 misdemeanors. That money pays for overhead and support staff salaries in addition to attorney salaries, but it does not provide funding for administration, management, or training. Additionally, nothing prevents a contracting entity from employing part-time contract attorneys as subcontractors, which enables them to continue paying flat fees to those attorneys to handle a portion of the caseload. See AM. BAR. ASS’N & MOSS ADAMS, THE OREGON PROJECT: AN ANALYSIS OF THE OREGON PUBLIC DEFENSE SYSTEM AND ATTORNEY WORKLOAD STANDARDS 31, 33 (2022) (acknowledging that Oregon’s updated system involves attorneys that subcontract to perform part-time indigent defense work), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls-sclaid-or-proj-rept.pdf [perma.cc/S29L-ZLR3]; Conrad Wilson, ‘This is Going to Get Worse’: Oregon’s Public Defense System Falters as Pandemic Continues, OPB (Jan. 12, 2022, 8:00 AM), https://www.opb.org/article/2022/01/12/oregon-public-defense-system-falters-pandemic-continues [perma.cc/L4VZ-N5CG]. Oregon may be moving away from flat-fee contracts in the future. Legislation passed as this Article was going to print calls on Oregon to gradually change to a system that relies at least in part on full-time public defenders, but those changes will not happen overnight. S.B. 337, 82nd Leg. Assemb., Reg. Sess. (Or. 2023); Tony Schick, Oregon Lawmakers Agree to Big Changes in Public Defense, with Big Work Left to Be Done, OPB (June 22, 2023, 7:48 PM), https://www.opb.org/article/2023/06/22/oregon-lawmakers-agree-to-big-changes-in-public-defense-with-big-work-left-to-be-done [perma.cc/SXZH-323H].


89. OREGON REPORT, supra note 86, at 165 (brackets in original).

90. See INCENTIVIZING QUALITY, supra note 55, at 12.

91. Id.

92. Id.
Flat-fee contracts also provide incentives for attorneys to avoid specialty courts like drug courts, veterans’ courts, or mental health diversion courts. These courts typically require individuals to appear multiple times over an extended period of time, but attorneys who are paid a flat fee per case do not have financial incentives to invest the time in repeat court appearances.

Some flat-fee contracts pay per event rather than per case. These systems are problematic because many of an attorney’s regular activities suddenly become unpaid tasks. Many courts pay only for in-court time, leaving preparation time uncompensated. Event-based systems also encourage attorneys to waste court time by pushing for unnecessary events just to get paid more. They also discourage attorneys from litigating or pressing issues that are not covered in the list of paid-for events. There are often conflicts of interest between the clients’ interests and the attorneys’ financial interests depending on how the fee structure is set up. In one metropolitan court in Michigan, attorneys were paid $110 for a plea, $60 for a sentencing hearing, $180 for a full-day trial, and $60 for a motion. Financially, the attorneys are better off if they spend the morning pleading out cases than if they spend the day in a trial or on a complicated motions hearing, even though trials or motions might better serve their clients’ interests.

Recognizing the perverse incentives created by flat-fee contracts, the American Bar Association (ABA) adopted a resolution in 1985 condemning governments resorting to indigent defense contracts in order to save money. In 1992, it issued a set of standards about the use of contract services to provide for indigent defense, noting that contract systems should not be a primary, stand-alone method of delivering indigent defense services, that all contracts need to “ensure quality legal representation,” and that contracts should never be awarded “primarily on the basis of cost.” A few states—including Idaho, Nevada, South Dakota, and Washington—have banned the use of low-bid, flat-fee contracts. But many states and counties continue to rely on low-bid, flat-fee contracts to provide for indigent defense services.

Mississippi relies predominantly on contract attorney services to provide for indigent defense. The Sixth Amendment Center found fixed-fee contracts in seven of the nine counties it studied in Illinois. As of 2014, the Wisconsin

93. See Appendix B.
94. INCENTIVIZING QUALITY, supra note 55, at 11.
96. 1992 ABA STANDARDS, supra note 46, § 5-3.1, at 45.
98. MISSISSIPPI REPORT, supra note 63, at iv.
99. ILLINOIS REPORT, supra note 63, at 144.
State Public Defender had fifty-eight fixed-fee contracts that compensated attorneys at a rate between $248 and $362 per case.100 Throughout Indiana, counties continue to rely on contracts that require attorneys to handle an unlimited number of cases for a flat fee.101 According to a 2008 report, contract defenders were the primary providers of indigent felony and misdemeanor representation in twenty-four counties in California and handled 41% of the cases in those jurisdictions.102

Even states that typically don’t use flat-fee contracts have resorted to experimenting with them to save costs and reduce caseload pressures. For example, the Maryland Office of the Public Defender piloted a flat-fee contract project in 2018 to reduce the size of its misdemeanor criminal traffic dockets.103 Private attorneys contracted with the state and were paid a $500 flat fee to handle a half day docket of criminal traffic cases. In a seven-month timeframe, the state contracted out over 9,500 cases to private counsel using these flat fees.104

Empirical research shows that attorneys who are paid a flat fee to handle indigent defense cases put less time into their cases than those who are paid by the hour for their efforts. In 2012, when South Carolina started using flat-fee contracts instead of paying attorneys by the hour, the amount of time attorneys spent on indigent defense cases decreased sharply. The same lawyers reported working 50% fewer hours when they were paid under flat-fee contracts.105 When North Carolina made a similar shift in 2008, attorneys spent 11% fewer hours on indigent defense cases and were 36% more likely to dispose of a case on the same day they met the client.106 That “meet ‘em and plead ‘em” approach is malpractice because it means that there is no investigation, legal research, or motion practice. Attorneys are simply not doing their job.


101. INDIANA REPORT, supra note 63, at viii.


104. Id.


B. Assigned-Counsel Systems

Before *Gideon*, courts that wanted to provide indigent defendants with counsel typically assigned private attorneys to them on a case-by-case basis.\(^{107}\) If the appointed attorney was paid at all, they would receive a flat-fee for their services or get paid by the hour with a cap on how much the system was willing to pay for representation. After *Gideon*, many jurisdictions opted to formalize these assigned-counsel systems. In some places, the courts created ordered assigned-counsel systems with official lists of private attorneys who were available to take indigent defense cases.\(^{108}\) These jurisdictions set fee schedules or hourly rates for attorney services that the judges and court staff administered. Some jurisdictions took administration of the system away from the judiciary and now have administrators who handle case assignments and payments.

In other places, the system is more haphazard. Judges set the rates and simply assign an indigent defense case to an attorney who happens to be in the courtroom.\(^{109}\) Sometimes attorneys who supported a judge’s reelection campaign get rewarded with indigent defense appointments.\(^{110}\) Other times, judges select attorneys they know will process the cases expeditiously without a lot of litigation because the judges don’t want to clog their dockets.\(^{111}\) These judge-appointment systems pose serious independence problems. Defense attorneys cannot zealously represent their clients’ interests if they have to worry about making the judge upset by taking too much court time. But even in systems where the judges don’t get to handpick assigned counsel, there are inherent problems with how assigned-counsel systems are structured.

Many of these appointed-counsel systems suffer from the same problems as flat-fee contract systems. If counsel is paid by the case or by the event as part of an assigned-counsel fee schedule, that schedule is the same as a flat-fee contract and poses all of the problems discussed above. It is better when appointed counsel is paid an hourly rate for their time and effort, but only if the hourly rates reasonably compensate attorneys for their work. The ABA Criminal Jus-

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tice Standards call for appointed attorneys to receive “compensation at a reasonable hourly rate . . . for all hours necessary” in addition to reimbursement for “reasonable out-of-pocket expenses.” But the reality is that assigned-counsel systems around the country are plagued by unreasonably low hourly payment rates with low maximum caps on the amount attorneys can earn per case.

Consider, for example, the assigned-counsel rates in New York. In 2003, appointed counsel in New York had average hourly overhead costs of $42.88, but they were paid only $40 per hour for in-court work and $25 per hour for out-of-court work on indigent defense cases. Attorneys lost money by representing indigent persons accused of committing crimes. So too in Wisconsin. From 1995 until 2020, Wisconsin paid assigned counsel at a rate of $40 per hour even though the average overhead cost of running a law practice in Wisconsin in 2013 was $41.79 per hour.

With abysmally low hourly payment rates, attorneys are not able to make a living wage doing indigent defense work. Many qualified attorneys won’t do the work. Just as in flat-fee contract systems, those who are willing to work at low assigned-counsel rates must supplement their indigent defense work with nonlegal or private legal work, which compromises the time available to work on indigent defense cases and creates conflicts of interest between the attorneys’ financial interests and their clients’ interests in zealous advocacy.

The average compensation rate for felony cases in the thirty states that had statewide compensation rates in 2013 was less than $65 per hour. That $65 per hour figure did not include any provision for the overhead costs of running a law practice. The average overhead cost for attorneys to run a law practice in Mississippi, which has the lowest cost of living in the country, was $34.86 per hour back in 1990. With $35 in overhead—which is incredibly low given that it comes from the state with the lowest cost of living and does not account for the cost of inflation between 1990 and 2013—attorneys paid $65 per hour would only keep $30 per hour in net compensation. But even that does not represent attorneys’ take-home pay. As was true with contract attorneys, assigned counsel are not considered government employees.

112. 1992 ABA STANDARDS, supra note 46, § 5-2.4, at 39.
113. GIDEON AT 50, supra note 50, at 16.
115. GIDEON AT 50, supra note 50, at 8.
117. WISCONSIN REPORT, supra note 100, at 7.
118. Lawrence S. Goldman, Gideon at 40: A Realistic View, CHAMPION, Jan./Feb. 2003, at 56; Andrew Lucas Blaize Davies & Alissa Pollitz Worden, Local Governance and Redistributive Policy: Explaining Local Funding for Public Defense, 51 LAW & SOC’Y REV. 313, 336 (2017); Neel
They typically don’t receive state or county benefits, and they are treated as independent contractors for tax purposes. Withholding 30% for taxes leaves assigned counsel with $20 per hour. And that still does not include the cost of health or retirement benefits.

Things have not improved much since 2013. As Appendix B shows, states and counties continue to pay assigned lawyers at rates that are as low as $30 per hour, with the average rate remaining around $65 per hour. Here is just a sample of those rates:

<table>
<thead>
<tr>
<th>State or Municipality</th>
<th>Hourly Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>$70</td>
</tr>
</tbody>
</table>
| California (San Francisco) | Serious felonies: $106  
|                        | Felonies: $89  
|                        | Misdemeanors: $66 |
| Connecticut           | Felony: $75   
|                        | Misdemeanor: $50 |
| Georgia               | $45–85       |
| Illinois (Cook County, which includes Chicago) | $40 in court  
|                        | $30 out of court |
| Indiana               | $30–60       |
| Kansas                | $80          |
| Louisiana             | $43.88 (statewide median) |
| Maryland              | $75 for cases involving a potential life sentence  
|                        | $60 for other cases |
| Montana               | $45 per hour for travel  
|                        | $56 per hour for professional time spent |
| New Jersey            | $60 in court  
|                        | $50 out of court |
| Ohio                  | $30–80       |
| South Carolina        | $40 out of court  
|                        | $60 in court |
| Tennessee             | Not to exceed $50 |
| Virginia              | $90          |
| Wisconsin             | $70          |


119. See Appendix B (collecting data and sources for each state).
Factoring in overhead costs of between $35 and $45 per hour depending on the cost of living, tax withholdings of approximately 30% for independent contractors, and the cost of purchasing benefits packages, these rates do not provide a living wage. Many of these low compensation rates are in place for years without accounting for inflation and without any built-in adjustments for rising costs of living. For example, New York did not raise its assigned-counsel rate for more than eighteen years. It can be incredibly difficult to push policymakers to update assigned-counsel rates. In most jurisdictions, there is pressure to cut the hourly rates to balance state and local budgets. For example, Montana used to pay assigned counsel $62 per hour to handle indigent defense cases, but the legislature cut the rates in 2018 due to budget constraints. Montana now pays only $45 per hour for travel time and $56 per hour for professional time. North Carolina slashed its assigned-counsel rates in 2011 and still has not restored them. Assigned counsel there used to get paid $75 an hour for low-level felonies and misdemeanor cases, but they now only get $55–60 per hour. A January 2019 survey of assigned counsel in North Carolina revealed that 20% of them make an effective hourly rate of less than $10 per hour; one in ten report losing money in indigent defense cases; one in ten have no health insurance, and an additional 40% only have insurance due to a spouse or parent; eight in ten do not earn enough to invest in retirement; seven in ten are sole practitioners; and 84% of them have no support staff whatsoever.

Wisconsin provides a good example of how much time and effort it often takes to raise attorney compensation rates. For twenty-five years, Wisconsin only paid assigned counsel $40 per hour. A report detailed how assigned counsel were losing money by taking on indigent defense cases. In 2018, the Wisconsin Supreme Court recognized that, with these “abysmally low” rates,
most attorneys will not accept appointments, “because they literally lose money if they take these cases.” Yet it still took multiple legal challenges before the state raised the rate in 2021 to $70 per hour, and that new rate is still significantly below the $100–140 per hour, market-appropriate rates that the Wisconsin Association of Criminal Defense Lawyers wanted.

In addition to having low hourly rates, most states impose caps on how much an attorney can charge for each case in order to contain costs. These caps are so low in some states that they effectively transform what look like assigned-counsel systems into flat-fee contract systems. When the maximum fee one can earn is so low that attorneys will regularly reach and exceed it, the system is essentially paying attorneys a flat-fee per case, which creates the same perverse financial incentives as the flat-fee contract systems.

Consider Virginia, for example, where the presumptive maximum fee an attorney can earn is $120 for misdemeanors in district court, $158 for misdemeanors in circuit court, $445 for felonies in circuit court that carry penalties of up to twenty years in prison, and $1,235 for non-class-1 felonies in circuit court punishable by more than twenty years. Assigned counsel are paid $90 per hour in Virginia, which means that assigned counsel are expected to spend less than 1.5 hours representing each client in a district court misdemeanor case. An attorney can spend more than 1.5 hours just waiting in court for a case to be called, to say nothing of the time they should spend meeting and interviewing the client, going to the crime scene to investigate, talking to potential witnesses, reviewing the police reports and other discovery information provided by the state, conducting legal research, drafting appropriate motions, appearing in court (sometimes multiple times) for hearings, and investigating and preparing for a sentencing argument. Misdemeanor charges in Virginia include theft, assault, drug possession, and driving under the influence of alcohol/drugs. They are often punishable by up to a year in jail and can carry a number of adverse collateral consequences, including deportation and loss of driving privileges. Less than ninety minutes is simply not enough time for an attorney to do their job.

And Virginia’s presumptive caps suggest that attorneys should spend less than five hours representing a client facing felony charges that could put them

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128. In re the Petition to Amend SCR 81.02, No. 17-06, at 3 (Wis. June 27, 2018).
129. See Wis. STAT. § 977.08 (2023).
130. See GIDEON AT 50, supra note 50, at 9 (listing twenty-six states); Appendix B (collecting information about fee caps).
132. See SUPREME COURT OF VIRGINIA CHART OF ALLOWANCES, supra note 131.
133. See, e.g., VA. CODE ANN. §§ 18.2-57, 18.2-96, 18.2-248.1, 18.2-270, 18.2-271 (2021 & Supp. 2023); Jeff Yates, Todd A. Collins & Gabriel J. Chin, A War on Drugs or a War on Immigrants? Expanding the Definition of ”Drug Trafficking” in Determining Aggravated Felon Status for Noncitizens, 64 MD. L. REV. 875, 880 n.26 (2005) (explaining that assault and larceny ”serve as common bases for deportation”).
in prison for up to twenty years. With a cap like that, there is no incentive to go to trial. Most trials take more than five hours to complete and that does not account for the time an attorney should spend preparing a case for trial. The message to assigned counsel is clear: if they go to trial, they will be doing a lot of work for free.\textsuperscript{134}

Virginia is not alone in having low fee caps. In North Dakota, assigned counsel are paid $75 per hour, and their earnings are capped at $300 for a misdemeanor and $575 for a felony, which means that they are expected to spend no more than four hours on a misdemeanor case and less than eight hours on a felony case.\textsuperscript{135} Massachusetts, rather than capping the amount an attorney can earn per case, caps the number of hours that the attorney can work in a year. Assigned counsel across the state complain that the statutory cap often means that they have to be willing to work many hours for free to adequately complete their representation of clients.\textsuperscript{136}

In states without statutory fee caps, the judges sometimes impose de facto fee caps by refusing to pay assigned counsel for the hours they work. In North Carolina, for example, 15.4% of private attorneys report that judges cut their fees in at least one fee application per month. The average number of hours cut per fee application was almost four hours.\textsuperscript{137} As one assigned attorney put it,

\begin{quote}
I’m constantly scared to ask for the actual amount of money I spent on a case. If we spend more than 5 hours our district judge requires an affidavit which makes us spend time to do the affidavit so for most attorneys I know it’s 4.9 if it’s 5 or more hours.\textsuperscript{138}
\end{quote}

Some Texas judges admit that they routinely cut the bills submitted by assigned attorneys. “I do it all the time,” said one judge. “I don’t understand how there’s eight hours of work [out of court] in a drug case. What are you doing on that case that could possibly take eight hours?”\textsuperscript{139} This kind of second-guessing by judges and interference in the defense function is structurally problematic because it forces lawyers to compromise client confidentiality in

\begin{footnotes}
\item[134.] Virginia does provide for a possible, additional $155 payment when necessary in extraordinary felony cases that might take more than five hours. But that adjustment doesn’t even add two hours of attorney time and is hardly sufficient. \textit{See id.}


\item[137.] \textit{Effective Pay Rate Study, supra} note 125, at 4.

\item[138.] \textit{Id.} at 3.

\item[139.] \textit{Texas Report, supra} note 85, at 154.
\end{footnotes}
order to justify the hours worked and inevitably discourages attorneys from doing work that is required to do their jobs effectively.

With caps as low as $575 per felony case, many assigned attorneys have no financial incentive to go to trial, do legal research, or investigate their cases. They are better off pleading out a case, getting their fee, and getting a new client. This creates conflicts of interest for attorneys by encouraging them to only work until they reach the fee cap before moving on to the next case. As the Supreme Court of Iowa put it, “low compensation pits a lawyer’s economic interest . . . against the interest of the client in effective representation.” It also encourages a volume practice under which attorneys take on too many cases. A 2012 study of Philadelphia homicide cases noted that the low compensation rates for assigned counsel meant that many attorneys took on more homicide appointments than they could effectively handle. As one attorney who was a part of that study put it, “[t]he way the system is built, it is very difficult for someone who wants to do a good job to get the money and time to be able to use best practices. It’s very hard for them to bill all that and get paid for it.” Similarly, a 2004 study of Virginia’s indigent defense system concluded that the state’s low statutory fee caps encouraged assigned counsel to put as little effort as possible into individual cases.

Even in states without fee caps (or with high fee caps), there are perverse incentives. Attorneys paid by the hour have a financial incentive to take longer to resolve their cases to earn more money. Empirical studies show that counsel working for hourly pay in jurisdictions that don’t have low fee caps often take longer to resolve their cases than their counterparts in the public defenders’ office, but do not achieve better outcomes. At the very least, this suggests that assigned-counsel systems might be less efficient. But, in some jurisdictions, there is reason to think that attorneys are intentionally padding their hours or dragging out their cases for financial profit. For example, Maine relies

140. See, e.g., David E. Patton, The Structure of Federal Public Defense: A Call for Independence, 102 CORNELL L. REV. 335, 369 (2017) (noting that disclosing what an attorney was doing in order to justify the hours worked could require the attorney to compromise client confidentiality, which is ethically problematic and also risks prejudicing the judge against the client in later proceedings).

141. Id. at 371; see also supra note 111 (discussing the pressure that courts put on defenders to process cases quickly).


144. Id.

145. GIDEON AT 50, supra note 50, at 17.

predominantly on an assigned-counsel system to provide for indigent defense.¹⁴⁷ According to a 2020 internal audit, there were hundreds of examples of Maine attorneys billing more than twenty-four hours a day,¹⁴⁸ with some individuals indicating that it took them thirty hours to prepare an email or attempting to get paid for other incredible tasks (like a twenty-hour phone call with a client).¹⁴⁹

With low hourly rates, the system depends upon lawyers supplementing their meager assigned-counsel income with paying clients. But when poor clients compete with paying clients for a lawyer’s time, it is no surprise who wins. Consider North Carolina, where the average rate for retained counsel handling an adult criminal case in 2019 was $239 per hour.¹⁵⁰ That is almost four times the $55–60 per hour rate that assigned counsel earn to handle misdemeanors and minor felonies and almost three times the $80 per hour rate that they earn for representing individuals charged with higher-level felonies.¹⁵¹ Or consider Kansas, which instituted an $80 per hour private counsel rate in 2006 when the average market rate for attorney services in Kansas was $150 per hour.¹⁵² In 2017, the average market rate for attorney services in Kansas was up to $225 per hour, but the private counsel rate for indigent defense remained at $80 per hour.¹⁵³

When hourly rates for appointed cases are a quarter or a half of the private market rates, attorneys have an incentive to quickly resolve appointed cases and spend more time on private cases. This means that attorneys, on average, spend less time preparing and litigating their assigned-counsel cases and more


¹⁴⁸. Id. at 10.

¹⁴⁹. Effective Pay Rate Study, supra note 125, at 4.

¹⁵⁰. See Off. of Indigent Def. Servs., supra note 124.


¹⁵². Id.
time on their retained cases. Empirical research bears this out. According to a 2017 study comparing assigned counsel to privately retained counsel in the fourth most populous county in Texas, appointed counsel resolved assigned cases 12.5% faster than similar retained cases and obtained far worse results for their assigned-counsel clients, both in terms of the rates of conviction and the expected sentence lengths.\(^{154}\)

Attorneys who can qualify to handle assigned cases in the federal criminal system have economic incentives to spend more time on their federal assigned-counsel cases than their state assigned-counsel cases because the federal rates are higher. As of January 2023, the hourly pay rate for federal assigned counsel was $164 with a $12,800 cap per felony case and a $3,600 cap per misdemeanor case.\(^{155}\) That rate is higher than the assigned-counsel rates in every state and significantly higher than the rates in most states.\(^{156}\) Once again, faced with limited time, the economically rational thing for attorneys to do is spend more time on federal assigned criminal cases or privately retained state cases than state assigned-counsel cases.

Low assigned-counsel rates make it difficult for many jurisdictions that have assigned-counsel systems to attract and retain qualified attorneys. Many experienced attorneys either leave or won’t volunteer to be on the assigned-counsel lists because they can make more money handling retained cases.\(^{157}\) This leaves many jurisdictions with inexperienced, overworked, and inherently conflicted attorneys on their assigned-counsel roster. A 2004 study of Virginia’s indigent defense system concluded that low statutory fee caps discouraged qualified criminal defense attorneys from taking court-appointed cases.\(^{158}\) Kansas has had trouble finding enough qualified people to join assigned-counsel panels.\(^{159}\) So too in Philadelphia, where researchers found that “[a]s a result of the below-market rate for appointed attorneys, many respected criminal defense attorneys refuse to be on the list to accept indigent defense

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156. See Appendix B (collecting rates).


158. GIDEON AT 50, supra note 50, at 17.

assignments.” And in Louisiana, the chief defender in one rural district reported in an interview that roughly half of the district’s cases were being handled by a single attorney who was tired, ready to retire, and had regular injuries that often interfered with his ability to work. When I observed courtroom proceedings in that district, I witnessed this attorney falling asleep in court. The chief defender wanted to replace him but couldn’t find another attorney who was willing to work at such low pay rates.

When there are not enough attorneys to handle the cases, states sometimes force attorneys who don’t have criminal defense experience to take cases. Consider, for example, an insurance lawyer with no criminal law experience who was appointed by a judge in Shreveport, Louisiana to represent a sixteen-year-old facing life in prison for stealing someone’s wallet and cellphone at gunpoint. The attorney complained that he did not think he was qualified to handle the case, but the judge would not remove him. Or consider the real estate lawyer in Sussex County, Delaware who called the county commissioner to protest his appointment to handle a criminal case, noting that he was not qualified to handle such a case. The commissioner’s response was simple: “get qualified.” In Knoxville, Tennessee, judges responded to a caseload crisis in misdemeanor court by drafting 1,200 practicing and nonpracticing lawyers into service as assigned counsel without compensation. And in January of 2022, the chief justice of the Oregon Supreme Court sent a letter out imploring “every available lawyer” to help mitigate the indigent defense crisis in that state by agreeing to take cases.

Some states have so watered down the prerequisites for getting on assigned-counsel lists that almost anyone with a bar card is eligible to handle indigent defense cases, even if they have no real criminal defense experience or training. In Oregon, for example, an attorney who graduates from law school, passes the bar, and watches five criminal jury trials can be appointed to represent criminal defendants who face up to a year in prison. As one attorney put it, “The state qualification standards are a joke.” Mississippi does not even require an attorney to watch a jury trial. Recent law school grad-

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160. Anderson & Heaton, supra note 143, at 194.
163. DELAWARE REPORT, supra note 75, at 175–76.
166. OREGON REPORT, supra note 86, at 109.
167. Id. at 110.
uates with no criminal law experience are regularly assigned to represent indigent defendants in serious noncapital felony cases. One personal injury attorney in Mississippi recalled how he protested when a circuit judge appointed him to handle an indigent defendant’s criminal case. When the attorney pointed out that he knew nothing about criminal law, the judge said, “you have five months to find out.” In Maine, a lawyer two years out of law school can, without any special training or supervision, represent criminal defendants facing any criminal charge other than homicide or sex offense charges as long as they have worked on two jury trials and two bench trials. In Texas, attorneys who graduated from law school one year ago can be appointed to represent individuals facing felony charges that carry up to ten years in prison. The only requirement is that they’ve sat second chair in one felony jury trial.

Between the minimal qualification standards that exist in many jurisdictions and the inability to supervise large numbers of nonaffiliated lawyers and law firms, quality problems exist in many assigned-counsel systems. For example, a recent audit of Maine’s statewide assigned-counsel system revealed that a quarter of the attorneys who had been disbarred, suspended, or reprimanded for misconduct in Maine in the past decade were on the assigned-counsel list. In 2008, the Wisconsin Criminal Justice Study Commission similarly found that half of the attorneys disciplined by the Wisconsin Supreme Court were on the private bar list for defense assignments.

Some jurisdictions have tried to impose quality controls by creating managed assigned-counsel systems. In a managed assigned-counsel system, experienced administrators hire and coordinate the assignment of cases to private attorneys. In theory, a good managed assigned-counsel system could create a cohesive, experienced, and knowledgeable private criminal defense bar by training and supervising them to ensure quality representation. In practice, however, many managed assigned-counsel systems are loosely organized and there are simply too many attorneys for a manager to effectively supervise and coordinate. Reports frequently cite San Mateo County, California as having a model managed assigned-counsel program. But a 2020 report on San

168. MISSISSIPPI REPORT, supra note 63, at vii; cf. Romero, supra note 13, at 1106 (examining requests for proposals to handle indigent defense contracts in rural areas and noting that one rural county in Idaho doesn’t require anything but an Idaho bar license).
169. MISSISSIPPI REPORT, supra note 63, at 49.
170. MAINE REPORT, supra note 67, at iv, 30.
171. TEXAS REPORT, supra note 85, at 180.
173. WISCONSIN REPORT, supra note 100, at 12.
175. See, e.g., NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 217–18 (2011); KATHLEEN CASEY ET AL., IND. TASK FORCE ON PUB. DEF.,
Mateo’s system found a lack of performance benchmarks for assigned attorneys, limited oversight and supervision of attorneys, and problems in the quality of the representation being provided.\textsuperscript{176}

Massachusetts has a managed assigned-counsel program that many have lauded as providing good training and oversight,\textsuperscript{177} but it still cannot escape the inherent incentive problems that assigned-counsel systems create. For example, in Massachusetts, private appointed attorneys are statutorily limited to billing 1,650 hours per fiscal year.\textsuperscript{178} Attorneys’ ethical obligations to zealously represent their clients mean that many attorneys wind up working for free once they exceed the cap on their billable hours. It has been challenging for the system to find attorneys to work on indigent defense cases in the last quarter of each year because of the statutory limits.\textsuperscript{179} And the compensation paid to assigned counsel is so low that courts cannot find enough attorneys to handle the caseloads.\textsuperscript{180}

Travis County, Texas, where Austin is located, experimented with a managed assigned-counsel system only to abandon the project and opt for a public defender office after a few years once it became clear that the assigned-counsel system was not working.\textsuperscript{181} Attorneys working for the assigned-counsel system were paid too little, took on too many cases as a result, and were performing significantly worse for their clients when compared to private counsel.\textsuperscript{182}

Some jurisdictions have created hybrid assigned-counsel/contract systems that use a combination of flat-fee payments and hourly payments with the goal of providing some incentive to take cases to trial. For example, the San Mateo County Private Defender Program in California pays counsel a flat fee

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\textsuperscript{180} See \textit{Carasquillo}, 142 N.E.3d 28 (noting that the Springfield district court doesn’t have enough attorneys to handle arraignments because of low compensation rates).


for each misdemeanor case, but if counsel goes to trial, attorneys will earn an hourly rate.\footnote{183} Unfortunately, the hourly pay is not high enough to shift attorneys’ incentives. A private defender working in San Mateo will make more money pleading out six domestic violence misdemeanors in one day than they can make if they have a bench trial all day.\footnote{184}

In some jurisdictions, the combination of flat fees and hourly rates creates perverse incentives. Consider how felonies are handled in Philadelphia. Private counsel receive a flat fee for pretrial preparation and are paid by the day (or half day) for trial time.\footnote{185} There is no financial incentive to prepare the case for trial because the pretrial fee is a flat fee. But there is a financial incentive to go to trial because attorneys can make more money with the daily rates. In the end, the system financially rewards people who go to trial unprepared.\footnote{186}

\section*{C. Public Defender Offices}

A third way to deliver indigent defense services is through salaried, full-time government employees who work for institutional public defender offices. Although a few jurisdictions had public defender offices before \textit{Gideon}, the Supreme Court mandate prompted many states and localities to create public defender offices, particularly in large, urban areas with higher case-loads.\footnote{187}

Public defender offices range in size from small offices with only a couple of employees to large law-firm-like entities with hundreds of employees.\footnote{188} They can be organized at the state level or the local level.\footnote{189} In addition to full-time criminal defense lawyers, public defender offices employ support staff that may include legal assistants, paralegals, advocates, investigators, interpreters, and social workers.\footnote{190} Some public defender agencies have attorneys

\begin{thebibliography}{99}
\bibitem{184} See id.
\bibitem{186} Anderson & Heaton, \textit{supra} note 143, at 164.
\bibitem{187} See Mayeux, \textit{supra} note 29, at 30, 102.
\bibitem{188} Compare Feb. 21 Open House to Introduce Pearl River County Office of the Public Defender, \textit{STATE OF MISS. JUDICIARY} (Feb. 12, 2018), https://courts.ms.gov/news/2018/02/07.18-Pearl%20River%20public%20defender.php [perma.cc/SLS7-G8HA] (describing a new public defender office in Pearl River County with three full-time attorneys), with \textit{About Us, Law OFFICES OF L.A. CNTY. PUB. DEF.}, https://pubdef.lacounty.gov/about-us [perma.cc/CF9S-84WN] (noting that the Los Angeles County Public Defender has thirty-two office locations with more than 700 attorneys).
\bibitem{189} See Appendix A.
\bibitem{190} See, e.g., \textit{Harlem, NEIGHBORHOOD DEF. SERV.}, https://neighborhooddefender.org/locations/harlem [perma.cc/GF3Q-HXZC].
\end{thebibliography}
on staff who specialize in immigration, housing, family law, or other civil areas.\textsuperscript{191} Public defender offices tend to have a chief defender and can have different tiers of supervisors depending on their size.\textsuperscript{192} Some offices have specialty groups to address mental health issues, advise on complicated forensic issues, or handle juvenile defense or capital cases.\textsuperscript{193} Others have legislative lobbying divisions or impact/special litigation branches to advocate for systemic criminal justice reforms.\textsuperscript{194} Some public defender offices handle the majority of indigent defense representation in a jurisdiction, while others handle only a fraction of the caseload.\textsuperscript{195} The thing that all institutional public defender offices have in common is that they are government-funded entities that employ full-time, salaried attorneys to handle indigent defense.

Some jurisdictions claim to have public defender offices, but if the attorneys in the office are not full-time, salaried, government employees who are prohibited from maintaining private practices, they are not institutional public defender offices for my purposes.\textsuperscript{196} In other offices, there is a chief defender who is a government employee, but all of the line attorneys are assigned counsel or contract attorneys.\textsuperscript{197} These also are not institutional public defender offices for my purposes. They are effectively assigned-counsel or contract systems with a government employee who is paid to manage the system.

As is true with other models of indigent defense delivery, public defender offices are notoriously underfunded and overworked. Many public defenders have low annual salaries and are forced to handle incredibly high caseloads. The average starting salary for full-time public defenders in the United States in 2021 was $66,193, with some public defenders earning as little as $45,000 per year.\textsuperscript{198} And the caseloads that they are forced to handle can be overwhelming. Public defenders in Fresno County, California were handling, on average, 1,375 misdemeanor cases or 418 felony cases per year.\textsuperscript{199} That is more than

\textsuperscript{191} See e.g., id.


\textsuperscript{193} See, e.g., MD. OFF. OF THE PUB. DEF., https://www.opd.state.md.us/about-us [perma.cc/BFM4-3DUD] (describing specialty divisions for juvenile defense, mental health issues, parental defense, and postconviction work).

\textsuperscript{194} See, e.g., What We Do, ORLEANS PUB. DEF., https://www.opdla.org/community-defense [perma.cc/WP2R-E26X] (describing the special litigation division where attorneys focus on systemic reform).

\textsuperscript{195} See Appendix A.

\textsuperscript{196} See, e.g., INDIANA REPORT, supra note 63, at 188 (describing the “public defender” office in Lake County, Indiana where attorneys are paid $31,505 per year and also have private practices).

\textsuperscript{197} See, e.g., LA. PUB. DEF. BD., supra note 54, at 432.


three times the nationally recommended maximum number of misdemeanor cases and almost three times the recommended number of felony cases under the then-applicable and now-outdated ABA standards. In Kentucky, a 2020 report indicated that public defenders in one county were being assigned an average of 474 new cases a year and that 40% of those cases were felonies. In Chicago and Atlanta, public defenders have been forced to handle more than 2,000 misdemeanor cases annually. And public defenders in Florida’s Miami-Dade County have handled more than 700 felony cases in a year.

Much has been written about the need for additional funding for indigent defense, and that need is certainly real. All indigent defense delivery systems are (and probably will continue to be) under-resourced, but there are important structural differences between underfunded public defender systems and underfunded assigned-counsel and contract systems. Structurally, public defender offices are insulated from the problematic financial incentives that plague assigned-counsel and contract systems. With full-time employment, public defenders have no occasion to worry about trading off time and resources between their indigent and nonindigent clients. They are not permitted to have private law practices. The government pays for the overhead costs of running an institutional public defender office, so line attorneys don’t have to worry about hiring staff or paying for office space. As government employees, public defenders typically receive government benefits. As a result, they don’t have to seek out other employment to have health insurance coverage, and they don’t have to pay independent contractor self-employment taxes. Additionally, because they are full-time government employees, public defenders are eligible to enroll in the federal government’s Public Service Loan Forgiveness (PSLF) program and have their educational debt forgiven over time.

That does not mean that public defenders don’t have to make tradeoffs. They often compromise personal leisure time to represent their clients more

200. See sources collected supra note 77. It is more than nine times the maximum number of misdemeanor cases under the recently promulgated workload standards. See id.


effectively, but that tradeoff is one that mission-driven public defenders are typically willing to make. Institutional public defenders work in an environment that puts pressure on them to do right by their clients. A public defender who has to justify their choices to colleagues and office leadership will go the extra mile to show their client-centered bona fides. Over time, this leads to burnout and high turnover rates in many public defender offices. That is a serious problem for defender offices, but it is different in kind from the financial incentive problems that plague assigned-counsel and contract systems.

III. THESE MODELS ARE NOT CREATED EQUAL

As early as the 1980s, research suggested that institutional public defender offices achieve better, more reliable outcomes for their clients at reduced costs when compared to contract and assigned-counsel programs. For example, when Clark County, Washington moved from a public defender office to a contract system in 1979, there was an immediate decrease in advocacy—characterized by more and faster guilty pleas, fewer trials, fewer motions, fewer requests for expert assistance, and more complaints from defendants. At the same time, an unexpected increase in the number of felony cases led to rising costs that made the contract system more expensive than its public defense predecessor. As time has passed, more research has confirmed that, in the aggregate, public defenders get better, more reliable outcomes for their clients than assigned and contract counsel and that public defense systems are more cost-effective than assigned-counsel and contract systems. Additionally, flat-fee contract and assigned-counsel systems pose inherent professionalism and legal ethics problems that do not exist to the same extent in public defender system structures. This does not mean that all public defenders are better than all assigned counsel or contract lawyers. There are certainly effective assigned counsel and contract attorneys and ineffective public defenders. But, as a matter of structural design, there are reasons to prefer public defense delivery systems.

A. Better, More Reliable Outcomes with Public Defender Systems

In the aggregate, public defenders achieve better, more reliable outcomes for their clients than contract and appointed counsel. On average, they obtain lower conviction rates and reduced sentence lengths for their clients, spend

206. See, e.g., Charles J. Ogletree, Jr., Beyond Justifications: Seeking Motivations to Sustain Public Defenders, 106 HARV. L. REV. 1239, 1272–74 (1993) (discussing how public defenders’ empathy motivates them to provide support to their clients and improves the quality of their representation).


208. NORMAN LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR: METHODS AND PROGRAMS FOR PROVIDING LEGAL REPRESENTATION AND THE NEED FOR ADEQUATE FINANCING 52 (1982).
more time on their cases, have a group structure that provides them with additional support, and are structurally set up to address systemic problems in the system in ways that their assigned-counsel and contract counterparts are not.

1. Lower Conviction Rates and Reduced Sentence Lengths

Numerous empirical studies document that defendants represented by assigned counsel and contract attorneys are more likely to be convicted than public defender clients. When convicted, they are more likely to be convicted of serious offenses than their counterparts who are represented by public defenders. When sentenced, they are more likely to get prison sentences than public defender clients. And their prison sentences are significantly longer than the sentences of those represented by public defenders.

For example, a 2012 RAND Corporation study of randomly assigned murder cases in Philadelphia found that assigning cases to public defenders instead of assigned counsel reduced the conviction rate by 19%, the probability that the defendant would receive a life sentence by 62%, and the overall expected sentence length by 24%.\(^\text{209}\) Going beyond homicide cases, a 2013 study out of Harris County, Texas—where Houston is located—found that public defenders outperformed assigned attorneys in felony and misdemeanor cases along every dimension.\(^\text{210}\) In felony cases, public defenders were more likely to get cases dismissed, more likely to get deferred sentences for their clients, and more likely to have their clients found not guilty than assigned counsel.\(^\text{211}\) Public defenders secured acquittals at three times the rate of appointed counsel.\(^\text{212}\) In misdemeanor cases, public defenders were five times more likely than assigned counsel to get dismissals for clients with mental health diagnoses.\(^\text{213}\)

A study analyzing data from San Francisco cases between 2006 and 2016 revealed that individuals who were represented by public defenders were 6.4% less likely to be convicted, 22% less likely to get a prison sentence, and had prison sentences that were 10.4% shorter than defendants represented by assigned counsel.\(^\text{214}\) Looking at multiple-defendant cases where one defendant was randomly assigned to a public defender and another to assigned counsel, public defender clients were 3.9% less likely to be convicted and 1.8% less

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209. Anderson & Heaton, supra note 143, at 159 (analyzing murder cases in Philadelphia from 1994 to 2005).


211. Id.

212. Id.

213. Id.

likely to receive prison time, while their prison sentences were 10.5% shorter than their codefendants who were represented by assigned counsel.\textsuperscript{215}

National studies on state indigent defense delivery systems produce similar results. A researcher from the Bureau of Justice Statistics analyzed felony cases in state courts in 2004 and 2006 in forty of the nation’s most populous seventy-five counties and found that almost half (46%) of defendants represented by assigned counsel or contract attorneys were sentenced to time in prison while only a third (32%) of public defender clients were imprisoned upon conviction.\textsuperscript{216} On the whole, defendants represented by assigned counsel and contract attorneys received sentences that were 26% longer than defendants who had been represented by public defenders.\textsuperscript{217}

Although data on rural jurisdictions is harder to find (because there are far fewer public defender offices in rural jurisdictions), there is reason to believe that these effects are not limited to large cities. In North Carolina, for example, research shows that public defenders statewide are better at resolving cases without a conviction, ensuring their clients are not convicted on the highest charge, and getting felony charges knocked down to misdemeanors than their assigned-counsel counterparts.\textsuperscript{218} Another study out of Wichita County, Texas—which has a small public defender’s office with only five attorneys\textsuperscript{219}—produced similar results. Public defender clients were 23% more likely to have their charges dismissed and 10% less likely to be found guilty when compared to defendants represented by assigned counsel.\textsuperscript{220}

Similar patterns exist in data comparing public defenders to assigned and contract counsel in juvenile and federal indigent defense systems. A study of over 2,800 juvenile court cases filed in Los Angeles revealed that youth represented by flat-fee contract attorneys had a “10% higher likelihood of being

\begin{itemize}
\item \textsuperscript{215} Id. at 15.
\item \textsuperscript{217} Id. at 49; see also Michael A. Roach, \textit{Indigent Defense Counsel, Attorney Quality, and Defendant Outcomes}, 16 AM. L. & ECON. REV. 577, 602 (2014) (considering national data on felony prosecutions in large counties between 1990–2004 and finding that public defender clients were less likely to be convicted than those represented by assigned counsel, that assigned-counsel clients were significantly more likely to plead guilty to the most serious charged offense, and that assigned-counsel clients got longer sentences than public defender clients).
\item \textsuperscript{220} Id. at ii, 66, 71.
\end{itemize}
convicted of a more serious category of crime” than public defender clients.\textsuperscript{221} They were also 34% more likely to be sentenced to a higher disposition level and received sentences that were 15% longer on average than the sentences of public defender clients.\textsuperscript{222} And in the federal system, public defenders have lower conviction rates and reduce expected sentences by 16% relative to private assigned counsel.\textsuperscript{223}

It is troubling that criminal case outcomes are significantly affected by the type of indigent defense delivery system in a jurisdiction. It suggests that many individuals face convictions and longer criminal penalties, not because they are culpable or deserving of additional punishment, but solely because their lawyers happen to work part time in an assigned-counsel or contract system instead of full-time in a public defender’s office. The unequal treatment is itself a problem worth fixing, but there is also reason to believe that the outcomes in assigned-counsel and contract systems are, in the aggregate, more unreliable and unjust than those reached in public defender systems.

2. More Time Spent on Cases

Research shows that, on average, appointed and contract counsel spend less time with their clients and do not investigate and prepare their cases as thoroughly as their public defense counterparts.\textsuperscript{224} It is hard to be confident that the system is reaching the right results if an attorney is not investigating the cases and no one is doing the research and preparation required to ensure that individuals’ rights are not violated.

Despite their often-overwhelming caseloads, full-time public defenders tend to spend more time on investigation, consult experts more frequently, and are more likely to file motions and advocate for their clients than assigned counsel. A study of attorney performance in Harris County, Texas revealed that public defenders spend an average of $135 per case on investigation as compared to an average of $13 per case spent by assigned counsel.\textsuperscript{225} When compared to assigned counsel, public defenders in Wichita County, Texas are

\begin{itemize}
  \item \textsuperscript{222} \textit{Id.} at 19–21.
  \item \textsuperscript{223} \textit{See} Iyengar, \textit{supra} note 146, at 3, 35; \textit{see also} Kelly Roberts Freeman, Bryce Peterson & Richard Hartley, \textit{URB. INST., COUNSEL TYPE IN FEDERAL CRIMINAL COURT CASES, 2015–18,} at 2, 22 (2022), https://www.ojp.gov/pdffiles1/bjs/grants/304552.pdf [perma.cc/G7V8-TGUH] (finding CJA panel clients had “18–25% greater odds of being sent to prison once convicted” and got sentences that were 4% longer on average than clients represented by federal public defenders); Shem-Tov, \textit{supra} note 214, at 3 (finding that federal defendants assigned to public defenders had lower probabilities of incarceration and their sentences were 4.64% shorter than defendants represented by assigned counsel).
  \item \textsuperscript{224} \textit{See} Anderson & Heaton, \textit{supra} note 143, at 200.
  \item \textsuperscript{225} \textit{FABELO ET AL., supra} note 210, at 2.
\end{itemize}
more likely to investigate their cases, and they spend 41% more time on misdemeanor cases, 45% more time on felony cases, and file twice as many motions in felony cases and over three times as many motions in misdemeanor cases.\textsuperscript{226} In Nevada, almost half of the requests for experts and investigation resources that came from rural courts in Nevada in 2017 originated in the five counties served by government-employed public defender offices even though they accounted for only one third of the rural counties.\textsuperscript{227} And a study of over 2,800 juvenile court case files in Los Angeles revealed that public defenders filed twice as many motions, sought appointment of experts twice as often, and were 40% more likely to request release and dismissal of their clients’ cases when compared to contract counsel.\textsuperscript{228}

There is some research suggesting that flat-fee contract attorneys spend even less time on average investigating, preparing, and litigating their cases than assigned counsel. A 2021 study conducted in North Carolina found that lawyers who are paid a flat fee are statistically more likely to spend less time on their cases, to dispose of their cases faster, and to meet and plead out their clients on the same day as compared to attorneys who are paid by the hour to handle indigent defense cases.\textsuperscript{229} Even if assigned-counsel systems are better than flat-fee contract cases, both are inferior to public defender models when it comes to the amount of time and effort devoted on average to pretrial investigation, preparation, and advocacy.

Coupled with the research about public defenders’ increased efforts resulting in more dismissals, acquittals, and lower sentences for their clients, this data suggests that assigned counsel and contract attorneys in the aggregate are not putting enough time and effort in to achieve reliable and just outcomes for their clients. That conclusion is further supported by studies revealing that assigned and contract attorneys put more time and effort into their cases when they are representing paying clients. According to a 2017 study of defense delivery systems in the fourth most populous county in Texas, attorneys who represent both indigent and retained clients in felony cases consistently report spending more time on their retained cases. On average, they report a ten-hour difference in time spent per felony case.\textsuperscript{230} There were also striking gaps in the average number of hearings and motions filed, with more motions and hearings in retained cases as compared to assigned cases.\textsuperscript{231} A majority of the surveyed attorneys admitted that the appointed-counsel and flat-fee contract systems gave them no incentive to provide quality representation, and many

\textsuperscript{226.}  CARMICHAEL & MARCHBANKS, supra note 219, at 34–37.
\textsuperscript{228.}  See Yamashiro et al., supra note 221, at 16–17, 27–28.
\textsuperscript{229.}  See Lee, supra note 106, at 4.
\textsuperscript{230.}  See Agan et al., supra note 154, at 24 (reporting 16.3 hours spent on average on an assigned felony case as compared to 26.7 hours on average for a retained felony case).
\textsuperscript{231.}  Id.
noted that the fee structure encouraged early plea practices.\textsuperscript{232} Not surprisingly, these attorneys achieved worse outcomes for their appointed clients than they did for those who retained them.\textsuperscript{233} When counsel was appointed rather than paid for, defendants were 50\% more likely to be found guilty and received sentences that were, on average, 11\% longer.\textsuperscript{234}

Texas A&M University found similar patterns in Wichita County, Texas. Assigned counsel had twice as many hearings on average for misdemeanor cases involving retained clients as they did in cases involving appointed clients.\textsuperscript{235} And attorneys in Wichita County reported spending half as much time on their appointed misdemeanor cases and one third less time on their appointed felony cases as compared to the time they spent on retained criminal cases.\textsuperscript{236} A 2015 survey of Wisconsin appointed counsel revealed that attorneys there spend 13\% less time, on average, working on their appointed cases than on similar retained cases and they spend, on average, 37\% less time meeting with their appointed clients than with their retained clients.\textsuperscript{237}

These findings are unsurprising given the financial incentives created by the structure of contract and assigned-counsel systems. Spending time on preparation is economically irrational for attorneys who are paid a flat fee or a very low hourly rate for their time and effort—especially when they can earn substantially more money by working on retained cases.\textsuperscript{238} For example, attorneys in Wichita County, Texas in 2011 could earn $196 per hour in retained misdemeanor cases and $211 per hour in retained felony cases, as compared to the less than $75 per hour they could earn for appointed criminal work.\textsuperscript{239} Salaried, full-time public defenders don’t face the same financial incentives to do less for their indigent clients.

In fact, research shows that well-run, institutional public defender offices get results for their clients that are comparable to, if not better than, those obtained by privately retained counsel.\textsuperscript{240} One researcher analyzed felony case disposition data from cases filed in state courts in 2004 and 2006 in forty of the nation’s most populous seventy-five counties and found that the overall conviction rates were the same for folks represented by public defenders as compared to private, retained counsel.\textsuperscript{241} Public defenders also seemed to perform better than private, retained counsel with respect to sentence length. Defendants represented by public defenders were sentenced to an average of

\begin{itemize}
\item 232. See id.
\item 233. See id. at 1–4.
\item 234. See id. at 2.
\item 235. CARMICHAEL & MARCHBANKS, supra note 219, at 35–36.
\item 236. See id. at 82.
\item 237. WISCONSIN REPORT, supra note 100, at 16.
\item 238. See Anderson & Heaton, supra note 143, at 199.
\item 239. CARMICHAEL & MARCHBANKS, supra note 219, at 82.
\item 240. See Cohen, supra note 216, at 49–53.
\item 241. Id. at 38.
\end{itemize}
twenty-three months in prison whereas those represented by retained counsel were sentenced to an average of thirty-one months in prison.\textsuperscript{242}

In Harris County, Texas, public defenders secured acquittals at three times the rate of appointed and retained counsel.\textsuperscript{243} And a 2019 study of indigent defense delivery systems in Hennepin County, Minnesota (which includes Minneapolis) showed that public defenders obtained significantly more dismissals for their clients and received sentences that were approximately four months shorter than the expected sentence length for similarly situated defendants represented by private counsel.\textsuperscript{244}

Raising assigned-counsel rates might marginally improve the quality of representation provided to indigent defendants in assigned-counsel systems. Guilty plea and conviction rates in New York’s poorest counties decreased by two percent, relative to New York’s other counties, after assigned-counsel rates were increased to $75 per hour in 2004.\textsuperscript{245}

Even with higher pay, there are structural features of assigned-counsel and contract systems that make them likely to produce less reliable results when compared to institutional public defender offices. Assigned and contract counsel still face perverse financial incentives that make investigation and preparation economically disadvantageous. In the federal system, where assigned counsel is paid $164 per hour for noncapital cases—\textsuperscript{246}—which is higher than the current assigned-counsel rates in every state—\textsuperscript{247}—public defenders continue to outperform assigned counsel with respect to sentence lengths.\textsuperscript{248} Assigned counsel have comparatively fewer resources than public defenders, and they face financial pressures to give short shrift to investigation and preparation.\textsuperscript{249}

\begin{itemize}
\item \textsuperscript{242} Id. at 39.
\item \textsuperscript{243} \textit{Fabela et al.}, supra note 210, at 2.
\item \textsuperscript{244} Ostrom & Bowman, supra note 146, at 42, 44.
\item \textsuperscript{246} Guidelines for Administering the CJA and Related Statute, supra note 155, ch. 2, § 230.16(a).
\item \textsuperscript{247} Appendix B (collecting state rates); Malia Brink, \textit{Crisis in Court-Appointed Counsel Rates: Searching for Sustainable Reform}, \textit{Crim. Just.}, Winter 2020, at 42 (noting that, as of 2020, assigned-counsel rates in the states were “considerably lower” than the federal assigned-counsel rate); \textit{Gideon at 50}, supra note 50, at 12 (noting that the federal hourly rate was higher than all of the states’ rates in 2013).
\item \textsuperscript{248} See supra note 223. According to one study, federal public defender clients are less likely to be found guilty than their counterparts who are represented by assigned counsel. Iyengar, supra note 146, at 3, 35. \textit{But see} Shem-Tov, supra note 214, at 3 (not finding a significant difference in conviction rates).
\item \textsuperscript{249} Anderson & Heaton, supra note 143, at 188.
\end{itemize}
3. Group Structure That Provides More Support

Structurally assigned and contract counsel tend to be more isolated than public defenders. Many assigned counsel and contract attorneys are sole practitioners who work without any support staff to assist them. There are no senior attorneys or colleagues in their office to whom they can turn with questions and ideas. They do not have investigators and social workers on staff to advise them. Often, no one supervises them. And even in managed assigned-counsel systems where there are attempts at supervision, it is incredibly difficult to supervise attorneys who are geographically dispersed. For example, the Maine Commission on Indigent Legal Services has three employees who oversee the work of “nearly 600 attorneys, handling cases in 47 courthouses presided over by approximately 90 justices, judges, and magistrates.” It is simply impossible. Without any real oversight, assigned counsel are more likely to make mistakes. Assigned counsel and contract attorneys typically do not have built-in mechanisms to keep up to date on legal developments, nor do they have internal training programs. As a result, assigned counsel and contract attorneys are slower on average to adopt new, creative strategies and approaches.

In contrast, the group structure of public defender offices encourages creativity and reduces the likelihood of attorney error. There is a fountain of knowledge and experience in the office, so attorneys can share ideas with one another, find mentors, and bounce creative ideas around. Embedded support staff, investigators, and social workers provide invaluable advice and support that enable public defenders to do more for their clients than sole practitioners can. And institutional public defender offices have the capacity and structure to provide regular trainings as well as built-in mentorship and supervision that can ensure quality representation. The group structure provides for better communication and more informal mentoring. Attorneys in a shared office benefit from pooled resources that save each attorney time and help them to do their job better. The sharing of physical space enables public defender offices to promote a client-centered ethos and create shared expectations around how to provide quality representation.

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250. See id.
252. MAINE REPORT, supra note 67, at iv.
253. See Anderson & Heaton, supra note 143, at 197–98.
254. See id. at 198, 208 (discussing assigned counsel’s difficulty in keeping up with legal developments and their relative lack of internal training).
255. See id. at 198.
256. See id.
257. See id.
The institutionalization and group structure of the defense function in a public defender office also enables public defenders to do things for their clients that assigned counsel and contract attorneys are not able to do. There are fewer administrative delays in getting counsel appointed when there is a local public defender’s office, which means that the public defender can staff attorneys at initial appearances and begin to earn a client’s trust and investigate the client’s case while the relevant evidence still exists and when the events are fresh in witnesses’ minds.\(^{259}\) Early investigation enables the defense attorney to ensure the preservation of key evidence and can lead to earlier resolution of cases.

Additionally, because public defenders are government employees, they often have access to court databases that private assigned and contract attorneys do not. In some jurisdictions, they can access court records including indictments, motions, pleadings, and other electronic court records that are not readily available to the private bar.\(^{260}\) This saves time and enables public defenders to spend additional time on investigation and research.

Public defender offices can attract free or low-cost assistance from law students and college students who are interested in learning more about indigent defense. They often have established internship programs that provide them with additional administrative, investigative, and legal research support. Sole practitioners do not typically have the same ability to attract interns. Internship programs often provide a pipeline for attorney hires down the line. Institutional public defender offices that have training, supervision, and benefits will be better able to attract qualified candidates than assigned-counsel and contract systems.

4. Ability to Mount Systemic Challenges

Public defender offices are uniquely positioned to advocate for systemic change in the criminal legal system. An institutional public defender office that represents the vast majority of criminal defendants in a jurisdiction sees trends over time. Its centralized institutional structure enables it to collect the data necessary to call out problems, expose bad actors, and work for procedural and substantive improvements in the system in ways that dispersed, isolated assigned and contract attorneys cannot.

Additionally, public defender offices can develop specialty practice groups that are better able to confront new, emerging forms of criminal investigation. As the criminal legal system grows more complex, prosecutors and police are investing in more scientific and computer-based methods of investigating

\(^{259}\) See, e.g., MAINE REPORT, supra note 67, at iii (noting the various delays in appointment of counsel when there is no public defender office); see also Feb. 21 Open House to Introduce Pearl River County Office of the Public Defender, supra note 188 (describing how full-time public defenders are able to meet their clients months earlier than assigned counsel).

\(^{260}\) CARMICHAEL & MARCHBANKS, supra note 219, at 13.
Criminal defense attorneys now must know about complicated DNA analyses as well as facial recognition software. Each case presents new forensic or technological challenges. Having a staff of trained, full-time criminal defense attorneys means that public defender offices can share acquired knowledge and expertise and develop practice groups that can help with forensic and technological investigative tools. Specialization is another way in which the economies of scale help public defenders learn about and test new investigative tools to ensure that the system reaches reliable results. Assigned-counsel and contract systems simply do not have a structure that enables them to do that.

B. Reduced Costs over Time with Public Defender Systems

Public defender offices are more cost-effective over time when compared to assigned-counsel and contract systems. First, public defender offices are able to take advantage of important economies of scale, which means that the same quality of representation costs less when provided by a public defender than when provided by assigned counsel or contract attorneys. Second, public defenders provide more budget predictability than assigned-counsel and contract systems. And third, public defenders are more effective at getting reduced sentences for their clients, which means taxpayers pay less to imprison and supervise individuals, resulting in additional savings.

1. Economies of Scale

As I have explained elsewhere, “[i]t is more efficient to pay for and run one public defender office than to fund many individual practitioners who are working separately but doing the same thing. Defenders working together can pool resources from office space and computer equipment to support services and intellectual capital.” Defenders can also “divide their work more efficiently, systematically train and supervise entering attorneys more readily, and

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261. E.g., Kevin C. McMunigal, Prosecutors and Corrupt Science, 36 Hofstra L. Rev. 437 (2007) (talking about prosecutors’ reliance on science); Matthew Digesti, Technology: The Difference Between Freedom and a Prison Sentence for Your Client, Nev. Law., Nov. 2014, at 38 (discussing how important technological investigation is in criminal cases now).

262. I am not suggesting that criminal legal system reforms should be primarily driven by cost-savings or economic efficiency approaches and am aware of valid criticisms that too much of a focus on cost-cutting measures may come at the expense of more promising reforms. See, e.g., Allegra M. McLeod, Beyond the Carceral State, 95 Tex. L. Rev. 651, 656 (2017) (reviewing Marie Gottschalk, Caught: The Prison State and the Lockdown of American Politics (2015)). As discussed supra Section III.A.3, public defender offices produce better, more reliable outcomes and also have a greater ability to advocate for important, systemic changes in the criminal legal system. The fact that public defender offices are also more cost-effective and efficient is worth noting, both because it makes the arguments for continued reliance on assigned-counsel and contract systems weak, and because it may appeal to some policymakers whose support is necessary to effectuate change.

263. Primus, supra note 35, at 131.
share information in ways that promote efficiency and improve the quality of representation.” Each attorney does not have to reinvent the wheel; instead, public defender offices develop model pleadings, forms, and briefs that make each attorney’s job easier and free attorneys to spend more time on other aspects of their representation. And public defenders do not spend time and resources on data entry into billing systems and paperwork to get paid because they are salaried employees. Similarly, public defense administrators do not have to handle fee vouchers from each employee and don’t have to audit and oversee a billing process to prevent overbilling. There are significant costs that come with administering an assigned-counsel or contract system. Each contract has to be negotiated, evaluated, and re-administered regularly, and there are costs associated with overseeing and evaluating the vouchers submitted by multiple, dispersed providers.

Public defender offices also save time for the courts because judges don’t have to make attorney appointments, follow up with attorneys who fail to appear, handle fee vouchers, assign experts, or address as many scheduling conflicts. The amount of time the county auditor has to spend preparing and tracking payments is greatly reduced. All of this translates into cost savings.

Studies in Texas document that public defender offices cost 23% to 31% less per misdemeanor and 8% to 22% less per felony than cases handled by assigned-counsel systems, which would result in annual statewide savings of

264. Id.
266. See supra Part II (discussing how institutional public defenders have salaries while assigned counsel are paid by the hour and have to bill their time).
267. See supra Part II.
268. See supra Part II.
270. ME.COMM’N ON INDIGENT LEGAL SERVS., AN EVALUATION OF MCILS’S STRUCTURE OF OVERSIGHT AND THE ADEQUACY OF ITS SYSTEMS AND PROCEDURES TO ADMINISTER PAYMENTS AND EXPENDITURES 1 (2020), https://legislature.maine.gov/doc/4769 [perma.cc/2UQC-SF54] (discussing issues with the efficiency and effectiveness of a voucher system); OREGON REPORT, supra note 86, at 29 (discussing the costs of administering the system as a whole).
271. See supra Part II; ME.COMM’N ON INDIGENT LEGAL SERVS., supra note 270 (discussing issues with the efficiency and effectiveness of a voucher system); OREGON REPORT, supra note 86, at 29 (discussing the costs of administering the system as a whole).
272. ME.COMM’N ON INDIGENT LEGAL SERVS., supra note 270 (discussing issues with the efficiency and effectiveness of a voucher system).
$13.7 million if public defenders handled all of the cases. Similar studies in New York and Iowa project cost savings of between $125 and $200 per case. In 2020, Kansas assigned counsel cost the state $175 more per case on average than the public defender. If the Kansas public defender took half the assigned-counsel caseload that year, it would have saved the state over $1.3 million.

Research shows that public defenders are able to work more efficiently than assigned counsel and contract attorneys without compromising quality. They take less time to resolve their cases than assigned counsel do and still achieve better outcomes for their clients. A 2007 study of federal indigent defense delivery estimated that assigned counsel took longer than federal public defenders to resolve similar cases, costing the system an additional $5,800 per case for a total cost of approximately $61 million per year. And the assigned attorneys actually got worse outcomes (more convictions and longer sentences) for their clients on average as compared to their public defender counterparts.

In Philadelphia, public defender clients facing homicide charges were 76% more likely to plead guilty than homicide defendants represented by appointed counsel, but there were no statistical differences in overall guilty rates between public defender clients who pled guilty and assigned-counsel clients who went to trial. In fact, the public defender clients got shorter sentences than those who were represented by appointed counsel. It appears that public defenders were better at earning their clients’ trust and obtaining plea deals for them that avoided the most serious charges and prevented the most severe


276. Id. at 24.

277. See Iyengar, supra note 146, at 3; Ostrom & Bowman, supra note 146, at 39–42.

278. Iyengar, supra note 146, at 4, 27.

279. See id. at 3.

280. See Anderson & Heaton, supra note 143, at 186–87.
sanctions. Appointed-counsel clients seemed to lose out on the benefits of lesser sentences through plea bargaining, without any statistically significant increase in the likelihood of acquittal after trial.\textsuperscript{281}

2. Better Budget Predictability

Public defender offices are also more cost-effective because there is more budget predictability with a public defender office than with an assigned-counsel or contract system.\textsuperscript{282} Public defender offices have large, stable infrastructures that permit more workload fluctuations without causing a need for dramatic budgetary adjustments. In contrast, it can be difficult to predict and contain costs in a private-attorney system. Salary-based public defender systems with embedded investigation and social work systems provide more fiscal certainty and can generate more accurate budget projections.

3. Better Client Outcomes Cost the System Less

Some may be concerned that increased reliance on public defenders would place too great a financial burden on the public fisc. In reality, the system as a whole would save money because of the reduced sentences that public defender clients get. When New Hanover County in North Carolina shifted from an assigned-counsel system to a public defender office in 2008, the average daily jail population decreased from 550 to 429 due to the new defender office’s early advocacy. At a daily bed cost of $80, the public defender office’s advocacy saved taxpayers over $3,446,080 in jail costs annually.\textsuperscript{283}

Public defenders also save money on the back end because their clients have lower conviction rates and shorter sentences than individuals who are represented by assigned and contract counsel. This results in reduced probation and prison costs. For example, the public defender office saved Wichita County, Texas $204 per indigent defendant compared to other court-appointed attorneys when accounting for differences in attorney, case processing, and postdisposition detention costs.\textsuperscript{284} The RAND Corporation found that Philadelphia could save over $200 million in reduced prison costs if public defenders represented all of those accused of homicide rather than paneling out 80% of those cases to assigned counsel.\textsuperscript{285}

Of course, jurisdictions that rely on low-bid, flat-fee contracts with little-to-no supervision of the attorneys’ performance incur fewer costs up front.

\textsuperscript{281} Id. at 187; see also Shem-Tov, supra note 214, at 3.
\textsuperscript{282} See, e.g., Lefstein, supra note 208, at 50–51 (noting that, after Clark County, Washington switched from a public defender office to a contract system, there was less budget predictability); see also 1992 ABA STANDARDS, supra note 46, at 46 (describing the instability of contract systems).
\textsuperscript{283} MAREA BEEMAN, JUST. MGMT. INST., USING DATA TO SUSTAIN AND IMPROVE PUBLIC DEFENSE PROGRAMS 16 (2012).
\textsuperscript{284} CARMICHAEL & MARCHBANKS, supra note 219, at 92.
\textsuperscript{285} See Anderson & Heaton, supra note 143, at 212.
The possibility of cost savings drove many jurisdictions to resort to flat-fee contracts in the 1970s and 1980s. But flat-fee contracts prioritize cheap and speedy disposition of cases over quality of representation.\textsuperscript{286} One study examined six counties in North Carolina that moved from assigned-counsel to flat-fee contract systems and found that the same attorneys spent 11% fewer hours on indigent defense cases and were 36% more likely to dispose of a case on the same day they met the client when they were paid under a flat-fee arrangement.\textsuperscript{287} Meeting a client for the first time in court and pleading out their case five minutes later without having done any investigation or research and without a real client consultation is not effective defense lawyering. And a lot of the money saved on the front end with a low-bid contract gets transferred to the back end when indigent defendants are convicted at higher rates and imprisoned for longer, and when those defendants challenge the effectiveness of their attorneys in appellate and postconviction proceedings. That same North Carolina study found a 36.5% increase in the probability of incarceration when counties moved to flat-fee contract systems. The increased costs associated with the additional incarceration could cost taxpayers as much as $22.1 million a year.\textsuperscript{288}

When jurisdictions rely on contracts without competitive bidding, the contracts are often more expensive than the cost of public defender offices.\textsuperscript{289} For example, contract attorneys in Montana cost 22% more per case than public defenders.\textsuperscript{290}

A well-resourced public defender system will result in higher quality representation at lower costs due to the economies of scale and institutional nature of a public defense system. This does not mean that public defenders are better attorneys than assigned or contract counsel; it simply means that the structure, support, and incentives in public defender offices are superior.

C. Fewer Ethical Problems with Public Defender Systems

All lawyers and legal defense delivery systems must comply with the profession’s ethical rules of professional responsibility, but the structure of flat-fee contract and assigned-counsel systems consistently requires line attorneys to violate ethical rules of professional responsibility in ways that a public defender structure does not.

It is a basic canon of legal ethics that an attorney “shall not represent a client if the representation involves a concurrent conflict of interest.”\textsuperscript{291} Yet,

\begin{itemize}
  \item \textsuperscript{287} Lee, \textit{supra} note 106, at 4.
  \item \textsuperscript{288} Id. at 34–35.
  \item \textsuperscript{289} See Alissa Pollitz Worden, \textit{Counsel for the Poor: An Evaluation of Contracting for Indigent Criminal Defense}, 10 JUST. Q. 613 (1993) (finding that contracting with competitive bidding saved money, whereas contracting without competitive bidding significantly increased costs).
  \item \textsuperscript{290} MONTANA AUDIT, \textit{supra} note 123, at 34–35.
  \item \textsuperscript{291} MODEL RULES OF PRO. CONDUCT r. 1.7(a) (AM. BAR ASS’N 1983).
\end{itemize}
attorneys working under flat-fee contracts or in assigned-counsel systems consistently face a tension between their clients’ interests in zealous advocacy and their own financial interests. Ethically, lawyer’s “own interests should not be permitted to have an adverse effect on representation of a client,” but that is unavoidable in these structures. Attorneys in flat-fee and assigned-counsel systems regularly face financial incentives to give short shrift to their indigent defense cases for their own personal, financial needs. They need to spend time on private, retained cases in order to make ends meet and support their families. That kind of financial conflict of interest simply does not exist when attorneys are paid salaries with benefits as part of a full-time, institutional public defender system.

That does not mean, of course, that there are no potential conflicts of interest in public defender agencies. Overworked public defenders certainly have to triage cases in ways that risk compromising one client’s interests for another’s. But that ethical problem is created by underfunding; it is not something inherent to the structural choice about how to set up the indigent defense delivery system. And public defender offices are in a better position to push back against that underfunding and go to the courts when they are overwhelmed—they can attempt to seek relief without having to worry about losing their flat-fee contract or not being assigned to future cases. Structurally, they are more insulated from political and judicial influence and can use their group structure to try to effectuate systemic change in ways that lawyers in flat-fee contract and assigned-counsel systems cannot.

IV. CONTINUED RELIANCE ON ASSIGNED-COUNSEL AND CONTRACT SYSTEMS

Despite clear research that institutional public defender offices are more ethical and cost-effective, and improve the quality and reliability of indigent-defense services, every state in the country and the federal government continue to rely on assigned-counsel or contract systems for indigent defense delivery. In 2012, the Sixth Amendment Center estimated that the majority of jurisdictions in the United States contracted with private lawyers as the primary system of indigent defense.

Even in states that have institutional public defender offices, assigned counsel or contract attorneys still handle large numbers of cases. These states

292. MODEL RULES r. 1.7 cmt. 10.
293. See, e.g., Joe, supra note 258, at 389.
294. See supra Part III.
resort to assigned-counsel or contract attorney systems whenever a case involves codefendants because the public defender office faces a conflict of interest if it tries to represent two or more defendants who might have adverse interests. According to the ABA, more than 25% of all cases in some jurisdictions are sent to private counsel due to conflicts of interest.296

Additionally, some statewide institutional public defender offices don’t handle all kinds of cases. For example, Kansas has a statewide public defender office, but only for felonies.297 Each county has to figure out how to provide counsel for misdemeanor cases, and most rely on assigned-counsel or contract systems.298

Then there are municipal crimes.299 Alaska has a statewide public defender office that handles felonies and misdemeanors.300 It also has another statewide agency to handle conflict cases, but neither state agency handles jailable municipal ordinance crimes, which include DWI, domestic violence, assault, theft, and vehicle tampering charges. Indigent defense representation in municipal cases is structured at the local level and is typically handled by assigned or contract counsel. Municipal defense representation can be a sizable percentage of the caseload in some parts of the state. Anchorage, for example, has an extensive penal code with 150 jailable offenses in its ordinances. Although there are also state laws against most of these offenses, Anchorage can collect fines and forfeitures in the cases if it prosecutes them under municipal law instead. For this reason, there is a dedicated municipal prosecutor’s office in Anchorage with an eleven-person unit for municipal domestic violence offenses. Municipal ordinance prosecutions are so frequent that the cases have their own blocks in the Anchorage courthouse for arraignments and bail/plea hearings. The city has a flat-fee contract with the Denali Law Group to provide defense attorneys in these jailable ordinance cases.301 According to lawyers at the firm, they handle between 4,500 and 5,000 municipal criminal defense cases per year.302 That is approximately one fifth of the total caseload handled by both Alaska statewide public defender agencies in a year.303

Alaska is not the only state where municipal ordinance prosecutions are common. About forty-three states currently have municipal courts that handle
city ordinance violations, which may include misdemeanors. 304 Indigent defense representation in these cases is typically provided locally through assigned-counsel or contract systems; municipal public defender offices are rare. 305

In the federal system, private, assigned counsel handle 40% of indigent defense representation. 306 Based on the information I have been able to obtain, I estimate that private counsel handle a similar proportion of indigent defense cases nationwide in state criminal courts. 307 Data in the states is much harder to obtain because so many states delegate the responsibility for structuring indigent defense to the counties, and many counties do not keep accurate data. For this reason, the data I have been able to obtain about state practices remains incomplete. But even in states with statewide public defender offices—where the data is most readily available—assigned counsel and/or contract attorneys continue to handle a significant proportion of the caseload. Consider the following representative sample of states with statewide public defender offices 308:

**Table 3: Percentage of Indigent Defense Cases Handled by Private Attorneys in Sample of States with a Statewide Public Defender Office**

<table>
<thead>
<tr>
<th>State (with a Statewide Public Defender Office)</th>
<th>Percentage of Cases Handled by Private Attorneys</th>
</tr>
</thead>
<tbody>
<tr>
<td>Colorado</td>
<td>9%</td>
</tr>
<tr>
<td>Connecticut</td>
<td>17%</td>
</tr>
<tr>
<td>Delaware</td>
<td>17%</td>
</tr>
<tr>
<td>Iowa</td>
<td>Approximately 50%</td>
</tr>
<tr>
<td>Maryland</td>
<td>8%</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>80%</td>
</tr>
<tr>
<td>Minnesota</td>
<td>Half of the state’s defenders worked part-time and have private practices</td>
</tr>
<tr>
<td>Missouri</td>
<td>19%</td>
</tr>
<tr>
<td>Montana</td>
<td>23%</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>12–15%</td>
</tr>
<tr>
<td>New Mexico</td>
<td>39%</td>
</tr>
<tr>
<td>Vermont</td>
<td>40%</td>
</tr>
</tbody>
</table>

305. See id.
306. See Defender Services, supra note 33.
307. See Appendix A.
308. See Appendix A (collecting data and sources for each state).
Even states with statewide public defender offices tend to rely on assigned-counsel or contract systems for almost one third of their cases. In states without statewide public defenders, the numbers are similar and sometimes the percentage of the docket handled by private counsel is much higher. According to a 2021 report on Texas’s indigent defense delivery systems, local public defender offices handled less than 16% of the adult, trial-level cases statewide.\(^\text{309}\) The remaining 84% of cases were handled by private counsel.\(^\text{310}\) Maine relies almost entirely on assigned counsel or contract attorneys for its indigent defense caseload.\(^\text{311}\) In North Carolina, private counsel handled 64% of indigent defense cases in 2019–2020.\(^\text{312}\) Oregon relies entirely on contracts to provide for indigent defense and two thirds of the lawyers it contracts with do not work for public defender offices.\(^\text{313}\) In Kansas, private attorneys handle 56% of felony cases and almost all misdemeanor cases.\(^\text{314}\) Overall, the data collected in Appendix A suggests that somewhere between a third and a half of indigent defendants nationwide are represented by assigned counsel or flat-fee contract attorneys.

How did this happen? The structural decision to delegate responsibility for providing indigent defense to localities is partially to blame because it pushes nonurban and rural localities toward assigned-counsel and contract models.\(^\text{315}\) Institutional, full-time public defender offices are able to provide better services at lower and more predictable costs, in part, because they can distribute resources effectively over time and space and take advantage of the economies of scale that come with representing large numbers of cases. When indigent defense is structured at the state level (or even at the county level for

<table>
<thead>
<tr>
<th>STATE (WITH A STATEWIDE PUBLIC DEFENDER OFFICE)</th>
<th>PERCENTAGE OF CASES HANDLED BY PRIVATE ATTORNEYS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Virginia</td>
<td>31%</td>
</tr>
<tr>
<td>West Virginia</td>
<td>33%</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>40%</td>
</tr>
<tr>
<td>AVERAGE</td>
<td>31.2%</td>
</tr>
</tbody>
</table>


\(^{310}\) See id.

\(^{311}\) MAINE REPORT, supra note 67, at iii.


\(^{313}\) See OREGON REPORT, supra note 86, at 31–32.

\(^{314}\) See KANSAS BOARD REPORT, supra note 152, at 10–11.

\(^{315}\) See Romero, supra note 13, at 1092 (noting that the delegation of responsibility from state to local governments has made the provision of indigent defense more difficult in rural and exurban spaces).
large urban areas), those benefits are readily apparent and easily realized. It makes sense to have a training director to train incoming public defenders because there is a new class of lawyers starting every year. Paying to obtain a statewide case management database to enable administrators to more easily track, monitor, and modify caseloads and provide supervision makes sense when overseeing all of a state’s indigent defense attorneys.

Some of these economies of scale cease to exist if every locality is an island unto itself. In a small county that does not hire an incoming class every year, a training director does not make economic sense. And a case management database is expensive and might not seem worth it in a county with fewer cases—where it is possible to track cases effectively on paper or with less expensive data systems. For many nonurban and rural counties, the startup costs associated with creating an institutional public defender office do not seem worth it if they have to bear those costs. See id. ("[T]he very common lack of resources... in rural and exurban spaces, often results in public defender services being delivered in methods that risk unique conflicts of interests, among other ethical issues.").

That might explain why many nonurban and rural counties opt for assigned-counsel or contract systems in states that delegate structural decisions to the counties. But it does not explain why some states—like Oregon and Maine—have statewide indigent defense delivery systems that continue to rely on assigned-counsel or contract models rather than statewide public defender offices. In recent years, a number of states—including Louisiana, Michigan, and Texas—have created statewide indigent defense commissions charged with developing standards to improve local delivery of indigent defense representation. These commissions have differing degrees of power, but there is one thing they have in common: they cannot take local control away from counties in determining how to structure indigent defense. Many of those counties want to keep their assigned-counsel and contract systems.

Power structures explain many of these decisions. Some judges like being in control of indigent defense assignment and want to maintain control to expedite the processing of cases. See Hunter Parnell, Mississippi Public Defense w/ Andrew de Gray, PUB. DEFENSELESS, at 43:28–44:45 (Dec. 20, 2021), https://www.publicdefenseless.com/episodes/blog-post-title-two-23b8c [perma.cc/3NSM-KEXV] (noting that judges want to maintain control and opposed a proposal that would have created state-funded district defenders).
and private cases. For a variety of reasons (good and bad), attorneys in assigned-counsel and contract systems like the guaranteed work, lack of supervision, and flexibility that comes with those structures, and judges like the ability to quickly process cases. As a result, they lobby against institutional public defender offices.\(^{319}\) Indigent defendants, who would benefit from institutional public defender offices, do not have similar lobbying power.

But this unequal power dynamic is only one part of this story. It does not fully explain why states with statewide public defender offices and counties that have opted to create public defender offices continue to rely on assigned-counsel and contract models for so many overflow and conflict of interest cases. These jurisdictions have already created institutional defender offices, so it is possible for them to establish conflict or overflow public defender offices. For example, Alaska has a state-structured conflict public defender, and Los Angeles County has an alternative public defender organized at the county level for conflict cases. But conflict public defender offices continue to be rare.

In addition to power dynamics, there is also a deep, historical commitment to ensuring a robust role for the private bar in indigent defense delivery. Before *Gideon*, when the charity model of indigent defense representation was prevalent, elite lawyers in Boston, Philadelphia, and New York rejected proposals to create institutional public defenders, fearing that public defender offices would be the first step toward socialization of the legal profession.\(^{320}\) They worried that government-funded indigent defense would take work from the private bar.\(^{321}\) Instead, they endorsed philanthropically funded indigent defense organizations that they could more easily control.\(^{322}\) Although much of the work performed by these voluntary defender organizations was done by law students or young lawyers fresh out of law school for little or no pay, it was the elite private bar that served on the organizations’ boards in order to influence policy choices about whom to represent and how to structure the organizations.\(^{323}\)

After *Gideon* recognized a constitutional right to appointed counsel, it was clear that government funding would be necessary to handle the increased volume of cases. A private charity approach would no longer suffice. But there was a push to maintain private influence and the availability of work for the private bar. After Congress statutorily reserved a substantial portion of federal indigent defense cases for the private bar, the elite members of the bar who were tasked with drafting standards and guidance for state indigent defense delivery systems insisted on a similar commitment.

\(^{319}\) See, e.g., Alan Cooper, *Virginia Governor Wants to Create Public Defender’s Offices in Three Counties*, Va. LAWS. WKLY., Jan. 11, 2010 (describing how some assigned-counsel lawyers and judges oppose the creation of public defender offices).


\(^{321}\) *Id.*

\(^{322}\) *Id.* at 31.

\(^{323}\) *Id.* at 33–34.
In 1973, the National Advisory Commission on Criminal Justice Standards and Goals urged each jurisdiction to have both a full-time public defender and “substantial participation of the private bar.”\(^{324}\) The ABA echoed this recommendation in its Standards for Criminal Justice Providing Defense Services, indicating a preference for statewide, full-time public defender organizations but also stating that “[e]very system should include the active and substantial participation of the private bar.”\(^{325}\) Preeminent scholars who wrote about the criminal system continued to echo this preference for the substantial involvement of the private bar until it became an entrenched and almost reflexive part of how policymakers thought about structuring indigent defense.\(^{326}\) But given empirical research demonstrating how problematic private bar involvement in indigent defense representation has become, perhaps it is time to revisit that decision.

V. MOVING TOWARD INSTITUTIONAL PUBLIC DEFENDER OFFICES

In this Part, I explain why arguments in favor of continued, substantial reliance on the private bar are outdated and unpersuasive. I then discuss why indigent defense delivery needs to be structured at the state level to capitalize on the advantages of the institutional public defender model and reduce reliance on the private bar. Finally, I use examples from states that have adopted reforms to explain how states can and should move toward more centralized, state-structured institutional public defender models without compromising the creativity and accomplishments of locally based public defender offices.

A. The Problematic and Outdated Arguments in Favor of Substantial Reliance on the Private Bar

There has not been much analysis of the reasons cited in support of maintaining a substantial role for the private bar in indigent defense representation. Many of the arguments for significant private bar involvement are historical relics based on outdated information about how the system works. Others are more practical, but they fail to think creatively about system structures. None of the arguments justifies continued reliance on systems that have been shown to be structurally inferior.

Some reasons cited in support of significant private bar involvement in indigent defense representation are relics of a different historical time and no longer withstand scrutiny. For example, many thought that involvement of the private bar would be necessary to lobby successfully for improvements to the criminal system. For that reason, when the ABA issued its Standards Relating to Providing Defense Services five years after *Gideon*, it encouraged court sys-


\(^{325}\) 1992 ABA Standards, supra note 46, § 5-1.2(b), at 3.

\(^{326}\) See, e.g., Lefstein, supra note 175, at 231–32.
tems to appoint every experienced and licensed trial lawyer to handle appointed criminal cases, arguing that the “active and knowledgeable support of the bar as a whole” was necessary to improve the criminal justice system.  

Prior to Gideon, when institutional defender offices were rare, the bar was smaller, and elite members of the private bar were directly involved in providing for indigent defense (both financially and structurally), it was true that public defenders needed private bar support to make improvements to the system.

Now, things are different. Jurisdictions with institutional public defenders represent significant numbers of criminal defendants and have power by virtue of the percentage of the docket they handle. Chief public defenders are often members of criminal justice coordinating committees that regularly bring together criminal legal system stakeholders to consider system changes and improvements. Institutional defender offices, with their group structure and shared mission, are the ones advocating for structural change.

In contrast, empirical studies confirm that “the bar as a whole” does not currently participate in assigned-counsel and contract systems. In fact, research shows that today’s assigned-counsel and contract defenders are, on average, less experienced private attorneys who may be less connected to the powerful legal establishment. Assigned counsel tend to be more geographically dispersed and less organized, and do not wield as much power in the
Any desire to have continued involvement from the private bar to help achieve systemic improvements does not justify maintaining the current assigned-counsel and contract systems. Even without assigned-counsel and contract systems, there are still powerful attorneys handling private defense cases who can be enlisted as allies.

Another argument in favor of the continued substantial involvement of the private bar was that private attorneys would “contribute substantially to the knowledge of defenders.” In 1973, the National Advisory Commission on Criminal Justice Standards and Goals stated that “[a] full-time public defender system as a practical matter may be limited in its quality and variety of skills to the public defender and his staff,” so substantial involvement of the private bar was necessary. The following year, the ABA urged law firms to “encourage partners and associates to appear in criminal cases.” The depiction of public defenders as “limited” and of criminal defense work as generalist work that private attorneys can pick up and substantially contribute to without training and experience is both demeaning to the public defense profession and out of touch with how specialized the field has become.

Perhaps it was easier for a general litigator to pick up a criminal defense case in the 1940s and 1950s—before the U.S. Constitution’s criminal procedure amendments applied to the states and created complicated motions practices; before the creation of tougher and more complex sentencing policies with sentencing guidelines; before the development of specialty courts that required different forms of advocacy; before the advent of DNA and many forms of forensic science that required defense attorneys to understand technical and scientific fields; and before innovations in law enforcement and the development of the internet required a specific understanding of different technologies. And maybe private defense bar involvement was necessary before there were a lot of institutional public defender offices around the country with developed expertise in how to handle criminal cases. But those offices exist now, and criminal defense work now is as specialized as patent or bankruptcy work. With people’s freedom on the line, we should not create a system that is structurally designed to rely on inexperienced private counsel who do not have support or training to handle indigent defense work.

Other arguments in favor of substantial participation by the private bar in indigent defense are more practical in nature, but these too do not withstand scrutiny. The ABA drafters thought having private attorneys available for indigent defense appointments could provide a “safety valve” that would ease caseload pressures, and they thought private defenders would be necessary in

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at 10 (noting that attorneys handling assigned cases in Texas tend to be less experienced than retained counsel); Cohen, supra note 216, at 53 (noting that assigned-counsel systems have been “disparaged” for appointing attorneys with inadequate skills/qualifications).


334. See NAC STANDARDS, supra note 324, at 264.

conflict of interest cases. But neither of these practical reasons justifies the reliance on assigned-counsel or contract systems. As discussed above, the money spent on assigned-counsel and contract systems is more efficiently and effectively allocated to an institutional public defender office. Hiring additional full-time lawyers, investigators, and social workers is simply better than paying for part-time assigned counsel or contract attorneys. And conflict public defenders can effectively handle conflict of interest cases while taking advantage of the benefits that an institutional public defender provides. In short, these practical arguments do not justify reliance on assigned-counsel and contract systems given the drawbacks those systems entail.

Perhaps the strongest practical argument in favor of assigned-counsel and contract models is about personnel. In many places, particularly more rural areas, there simply are not a lot of available lawyers who are able and willing to take on indigent defense representation. The caseloads in many rural jurisdictions are not high enough to justify the creation of local public defender offices, and there are not lawyers who would work full-time in such offices if they were created. Some argue that, without assigned-counsel or contract systems, there would not be sufficient available personnel to provide legal representation. This is certainly true if indigent defense is structured at the county level. As discussed above, the localization of indigent defense delivery systems is a primary reason why many nonurban and rural areas have opted to create assigned-counsel and contract systems. But necessity is not a reason to continue to rely on systems that have been shown to produce inferior and cost-ineffective results when there is a structural solution that can address the personnel concern and produce a better system: state-structured indigent defense systems.

B. State-Structured Public Defense

Public defender offices can be local institutions designed to handle the caseload for a specific city or county or they can be statewide offices responsible for handling an entire state’s caseload. Only when indigent defense administration is centralized can a state fully realize the benefits of institutional public defense discussed in this Article and solve the personnel problems that exist in nonurban and rural parts of the state.

There are significant advantages that come with the centralization of services, including the ability to form a more focused and unified vision for the organization; the capacity to distribute work more equally; smoother proce-

336. 1992 ABA STANDARDS, supra note 46, § 5-1.2, cmt. at 7–8.
dures with more built-in flexibility; the possibility of specialization; and economies of scale that reduce costs, save time, and improve the quality of the work product produced. These advantages are particularly important in under-resourced, high-volume industries like indigent defense.

Jurisdictions can realize some of these advantages by creating public defender offices in their big cities, but the advantages then extend only as far as the city or county border covered by the public defender office. If public defenders want to push for additional state funding, for example, they will need centralized data that can present a clear picture of the underfunding throughout the state, show what additional funding is necessary, focus the fight on where assistance is most needed, and assure legislators that the additional funding will be used effectively. When there is a statewide administrative structure and all indigent defense delivery systems use a common database, it is easier to collect and organize that data. But if indigent defense delivery systems are decentralized, there is no shared understanding of what data are necessary, and there are no reliable means of tracking and reporting information about what is going on in the counties.\(^{339}\) Even something as small as what counts as a “case” for purposes of assessing caseloads can be defined differently from county to county.\(^{340}\)

There is also more power and ability to push for systemic change when the public defense system is centralized. Some jurisdictions have caseloads that are so high that they have threatened to refuse additional cases or begun refusing them to bring other criminal system actors to the negotiating table.\(^{341}\) That kind of collective action requires coordination and is most effective if the threatened action has a real impact on the system’s operation. An agency that represents 80% of the indigent defendants throughout the state has a lot of power—more than one local office would—to effectuate statewide change and force other state actors to the bargaining table. And, as discussed above, statewide offices often see problematic patterns in the criminal legal system throughout the state and have the power and organization to lobby the legislature or raise legal challenges through the judiciary to effectuate change in ways that localized offices cannot.

The ability to create specialized practice areas is an increasingly important benefit of centralization as criminal defense representation becomes more complicated and draws on expertise from other fields like science and technology. Statewide public defender offices have IT departments to help with technology and specialized statewide units to help attorneys navigate complicated areas. For example, the Maryland Office of the Public Defender has

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340. Id. at 2.

statewide social work, forensics, mental health, and juvenile protection divisions that work across the state and organize resources for all of the trial divisions.\textsuperscript{342} Many statewide public defender offices have appellate divisions that are available to field legal questions from trial attorneys. Minnesota’s attorney-of-the-day program, for example, enables trial-level defenders to call state-employed appellate public defenders with legal questions.\textsuperscript{343} The degree of specialization possible increases with greater centralization.

And centralization enables all indigent criminal defendants in the state’s jurisdiction to obtain equal access to defense services instead of having good institutional public defender representation in major cities and less effective private bar representation in nonurban and rural areas of the state. Statewide public defender offices can provide for regionalization of indigent defense services in ways that enable more rural areas to take advantage of economies of scale and access resources that might traditionally only be available in larger, more urban defender offices.

For example, the statewide Office of the Colorado Public Defender has created regional offices that cover multiple counties.\textsuperscript{344} As part of the statewide system, these regional offices have access to the infrastructure and database services of the statewide agency and can tap into the expertise of the collective body of lawyers in the state. They also get statewide training, supervision, and support.\textsuperscript{345}

Additionally, statewide public defender offices have centralized administrative units that recruit, hire, train, place, and supervise lawyers in different branch offices around the state. And statewide agencies are developing creative ways to deal with the personnel problems that would otherwise exist in rural areas.

The Montana Office of the Public Defender, for example, has started a pilot program under which it provides reimbursements for relocation and bar admission to attorney applicants in underserved regions of the state.\textsuperscript{346} Other states are considering experimenting with creating specialized units of defenders that travel to rural areas of the state to handle capital or other serious criminal cases that are not routine parts of rural practice. The State of Nevada, for example, “has statutory loan forgiveness programs to help entice doctors and nurses to provide healthcare in underserved areas of the state” and to bring talented teachers to rural jurisdictions, and some experts have proposed creating a similar program at the state level to encourage attorneys to provide

\textsuperscript{343} Email from Gina Schulz, Minn. Pub. Def., to Eve Primus, Yale Kamisar Collegiate Professor of L., Univ. of Mich. L. Sch. (June 23, 2022, 2:33 PM) (on file with author).
\textsuperscript{344} Offices, OFF. OF THE COLO. STATE PUB. DEF., https://www.coloradodefenders.us/offices [perma.cc/QPB6-AJT6].
\textsuperscript{345} See id.
\textsuperscript{346} MONTANA AUDIT, supra note 123, at A-3.
indigent defense representation in rural parts of the state.\textsuperscript{347} Others have argued for a Peace Corps or Teach for America model for indigent defense under which lawyers are trained and sent to underserved areas of the state for a few years with the hopes that they establish roots and stay.\textsuperscript{348}

When the Colorado Public Defender extends an offer to an entry-level attorney, it does not tell them what office they will be placed in and requires them to be willing to go to any area in the state.\textsuperscript{349} Some attorneys who are placed in more rural areas transfer to more urban ones down the line, but others stay with their initial placements.\textsuperscript{350} Because they are statewide agencies, these public defender offices are able to come up with creative solutions to ensure that all defendants have access to full-time public defenders.\textsuperscript{351}

There are, of course, disadvantages to centralization as well. Those who oppose statewide public defender agencies argue that such offices will be too bureaucratic and will not address the local needs of different communities.\textsuperscript{352} Many of the nation’s most well-regarded public defender offices are county-based and have developed creative and innovative initiatives to address local problems.\textsuperscript{353} Others have been pioneers of holistic indigent defense and participatory defense partnerships that have raised the level and quality of representation that they provide for community members.\textsuperscript{354} These offices fear that absorption into a statewide agency might result in a leveling down of services under which resources are redistributed from more established, larger offices that serve most of the population to rural areas that would provide better representation for a much smaller segment of the population.\textsuperscript{355}

\begin{footnotesize}
\begin{itemize}
  \item 347. NEVADA REPORT, supra note 227, at 179–80.
  \item 348. Gideon’s Promise is a nonprofit organization that is doing something like this in the South. See GIDEON’S PROMISE, https://www.gideonspromise.org perma.cc/P9H8-QSMV.
  \item 349. Attorney Positions, OFF. OF THE COLO. PUB. DEF., https://www.coloradodefenders.us/jobs/attorney-positions perma.cc/2CZR-M4KL.
  \item 350. Id.
  \item 351. A statewide agency could also mobilize and lobby for changes to state bar admission rules that might make it easier for lawyers from other states to waive in and ease the difficulty of finding individuals who are willing to live in rural areas. Cf. Gabriel J. Chin, Toward National Criminal Bar Admission in U.S. District Courts, 89 FORDHAM L. REV. 1111 (2021).
  \item 353. E.g., About Us, BRONX DEFS., https://www.bronxdefenders.org/who-we-are perma.cc/77N9-8TLG; About Us, ALAMEDA CNTY. PUB. DEF., https://publicdefender.ac.gov.org/About.page perma.cc/8ZDY-7DXS; see also The Story of PDS: 60 Years as a Model Defender Program, PUBLIC DEF. SERV. FOR THE D.C., https://www.pdsdc.org/about/historical-timeline perma.cc/NEL8-6VZW.
  \item 354. About, NEIGHBORHOOD DEF. SERV., https://neighborhooddefender.org/about perma.cc/4B6Q-MKVK.
  \item 355. See, e.g., CALIFORNIA COMMISSION, supra note 102, at 99 (“Some public defenders have expressed concern that, rather than elevating the quality of indigent defense services in California, [a statewide agency] will create a race for the bottom.”).
\end{itemize}
\end{footnotesize}
This is certainly a legitimate concern, but it can be addressed by thinking about how the statewide agency is structured. Every division or subunit of the statewide agency does not have to look and function exactly like the others. In fact, it will often be the case that different parts of the state have different needs and that different divisions have different needs—both in terms of how the public defender office is structured and in terms of funding. There are ways to centralize the administration of the system, provide the economies of scale discussed above, create specialization and expertise, and push for system-wide reform while still permitting creative and innovative community-based public defender programs and structures to thrive. In fact, recognizing the ability of a statewide institutional public defender to have this kind of flexibility is part of what will enable states to get over the political opposition to centralization.

C. How to Get There

Less than a third of states currently structure indigent defense at the state level and provide for institutional public defenders with full-time employees. There are two continuums along which states need to move: (1) toward institutional public defender and regional defender models with full-time employees, and (2) toward greater centralization of indigent defense administration at the state level. As I have discussed above, these continuums are related in an important respect: the more localized the decisionmaking about how to structure indigent defense, the harder it is to create institutional public defender offices in nonurban and rural areas. But statewide structure doesn’t necessarily push toward institutional defenders, as Oregon and Maine show.

Some states are moving gradually and slowly toward institutional defender models and more centralized, state structures. States can move simultaneously down these two paths toward reform. States that went immediately to statewide institutional public defender offices in the wake of Gideon did just that. That is much harder now because states have entrenched systems for providing indigent defense, and there are people who are employed by and wed to those systems. Overcoming that inertia and the objections that will come from those who work in the current systems will require political energy and care. It may take time, creativity, and a little grandfathering, but it is possible.

The strategy for shifting political support away from locally controlled assigned-counsel and contract systems toward state-structured institutional public defender offices will vary by jurisdiction. The high probability that innocent people are likely being convicted and imprisoned due to the lack of

356. See Romero, supra note 13, at 1095 (rejecting a “one size fits all” approach because “effective solutions to rural woes will only come from meeting rural locations where they are at”).
357. See Appendix A.
358. See supra notes 311–316 and accompanying text.
359. See supra Section II.C.
investigation prevalent in assigned-counsel and contract systems may motivate some politicians.\textsuperscript{360} Others may look at the potential fiscal savings and be convinced that a public defender office is the better way to go.\textsuperscript{361} And sometimes it will be necessary to collect data that documents the constitutional and ethical problems of assigned-counsel and contract systems and follow up with media attention and litigation in order to catalyze reform.\textsuperscript{362}

Consider, for example, Michigan, where there have been huge steps toward the creation of institutional public defender offices in recent years. After \textit{Gideon}, Michigan delegated responsibility for structuring indigent defense to each of its eighty-three counties.\textsuperscript{363} Most opted for assigned-counsel or contract systems until a number of scathing national reports and an ACLU lawsuit shed light on the poor quality of indigent defense representation in Michigan’s criminal courts and prompted the governor to create a commission to recommend improvements.\textsuperscript{364} Based on the commission’s findings, the state legislature created the Michigan Indigent Defense Commission (MIDC) in 2013,\textsuperscript{365} a state agency with authority to promulgate right-to-counsel standards.\textsuperscript{366} For each performance standard that MIDC creates, local districts must come up with plans for how they will comply with the standard and MIDC must, in turn, approve their plans and lobby the state legislature to cover any additional expenditures associated with implementing them.\textsuperscript{367}

Before MIDC was created, only eight counties in Michigan had institutional public defender offices. Now, because of the pressure on the counties to comply with MIDC standards and data that MIDC has shared about the cost-effectiveness and quality of public defender agencies,\textsuperscript{368} there are thirty-two

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\textsuperscript{360} Inadequate defense representation at trial is a frequent contributor to wrongful convictions. See Inadequate Legal Defense, \textsc{The Nat’l Registry of Exoneration}s, https://www.law.umich.edu/special/exoneration/Pages/Inadequate-Defense.aspx [perma.cc/BVAW-BG68]. According to a 2019 Study of 366 exoneration cases in which inadequate trial counsel was deemed a contributing factor to a wrongful conviction, 80.6\% of the cases involved investigative failures. \textit{Id.}

\textsuperscript{361} \textit{See supra} Section III.B.


\textsuperscript{363} \textit{See The Right to Counsel in Michigan, Sixth Amend. Ctr.}, https://sixthamendment.org/know-your-state/michigan [perma.cc/CGB5-Q6CF].

\textsuperscript{364} \textit{See}, \textit{e.g.}, Duncan, 774 N.W.2d 89; \textit{Race to the Bottom, supra note} 110; Duncan v. Granholm, ACLU MICHIGAN, https://aclumich.org/en/cases/duncan-v-granholm [perma.cc/XXI8-A4GS].


\textsuperscript{367} \textit{See id.}

\textsuperscript{368} Jonah A. Siegel, Mich. Indigent Def. Comm’n, Snapshot of Indigent Defense Representation in Michigan’s Adult Criminal Courts: The MIDC’s First Survey of the
public defender offices in the state, and the percentage of indigent defense cases handled by full-time institutional defender offices has tripled.\textsuperscript{369} Michigan has a long way to go with far too many counties still dependent on the private bar for indigent defense services, but there have been huge improvements in the last ten years, even though there is still local control over the structure of indigent defense.\textsuperscript{370} Perhaps in time, once more public defender and regional public defender agencies exist, Michigan will see the benefits of more centralized state administration and begin creating common recruiting, hiring, training, and data collection systems. For now, Michigan’s incremental approach is working. Attorneys from the older, entrenched assigned-counsel and contract systems are gradually retiring, focusing fully on private work, or becoming acclimated to the new requirements. Other states starting with decentralized, local control over indigent defense and substantial reliance on the private bar can look to Michigan’s incremental approach as a model for how to move forward.

In contrast, a state like Maine—which already has a centralized state structure but does not have public defender offices\textsuperscript{371}—might look to Massachusetts or Washington, D.C. when thinking about how to institute reforms. Both Massachusetts and D.C. have centralized systems with extensive training programs and specialized units that gather expertise and fight for systemic change.\textsuperscript{372} But indigent defense representation in Massachusetts and D.C. also relies heavily on assigned-counsel systems.\textsuperscript{373} Maine could start with a statewide public defender office that handles a smaller percentage of the overall cases—like Massachusetts’s Committee for Public Counsel Services (CPCS), whose public defenders handle only 20% of the indigent defense caseload,\textsuperscript{374} or D.C.’s Public Defender Service, which handles only 15% of the indigent defense caseload.\textsuperscript{375} Maine’s new public defense office could then take on the training and supervision of the assigned-counsel system, much as CPCS has done in Massachusetts, with the hopes of gradually increasing the

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\textsuperscript{369} MICH. INDIGENT DEF. COMM’N, 2021 OVERVIEW 2, https://michiganidc.gov/wp-content/uploads/2022/01/MIDC-2021-Highlights.pdf [perma.cc/ZSK2-U22Q]; Email from Jonah Siegel, Rsch. Dir., Mich. Indigent Def. Comm’n, to Eve Primus, Yale Kamisar Collegiate Professor of L., Univ. of Mich. L. Sch. (July 7, 2022, 4:17 PM) (on file with author) (estimating that the percentage of cases handled by public defenders jumped from 9% to 27% since MIDC standards were introduced).

\textsuperscript{370} SIEGEL, supra note 368, at 18.

\textsuperscript{371} See supra notes 147, 311 and accompanying text.


\textsuperscript{373} See Appendix A notes 445–447, 540–542 and accompanying text.

\textsuperscript{374} See Appendix A note 447 and accompanying text.

\textsuperscript{375} See Appendix A note 542 and accompanying text.
reliance on full-time public defenders and decreasing the reliance on the private bar. Again, such a gradual approach might reduce the opposition from entrenched members of the bar who are wedded to the old system.

States that are farther along and have state-structured institutional and regional public defender offices but continue to rely heavily on the private bar to handle substantial portions of their caseload should use the data in this Article to argue for a shift in state resources. The caseloads should move—gradually if necessary—away from the private bar and into the public defender system. Jurisdictions with institutional and regional defender offices that rely predominantly on the private bar for overflow and conflict cases should consider developing conflict divisions within their statewide public defender models or separate statewide agencies to handle overflow and conflict cases. It may be inevitable that some small percentage of cases will still need to be handled by assigned counsel, but those lawyers should be screened and trained by the state public defender agency and paid reasonable hourly rates for their services.\footnote{Consider the Public Defender Service’s training program for federal CJA attorneys. See PDS Training Programs, PUB. DEF. SERV. FOR THE D.C., https://www.pdsdc.org/professional-resources/pds-training-programs/criminal-justice-act-new-panel-training-program [perma.cc/Z6PS-8KK2].} Ideally, assigned counsel would be former public defenders who have training and experience and remain connected to the institutional group structure that public defender offices provide.

Ultimately, each state is at a different starting point, both with respect to how much they rely on the private bar and with respect to how centralized their indigent defense delivery structures are. Policymakers interested in reform should begin by creating a statewide task force consisting of a diverse group of criminal justice stakeholders and policymakers (including defense attorneys from across the state)\footnote{Primus, supra note 35, at 143.} to make recommendations for improvements based on best practices that consider both that particular state’s starting point and any politically entrenched local interests.

CONCLUSION

The choice of how to structure indigent defense delivery systems directly impacts the quality of the defense function and the legitimacy of the criminal legal system. If we want people to have faith in the system, we have to structure indigent defense delivery to ensure that individuals are provided with lawyers who are not financially conflicted and who do not have incentives to give short shrift to indigent defense cases.

Robust empirical evidence shows that institutional public defender offices are structurally superior to assigned-counsel and contract systems because they lead to better, more reliable results and are more cost-effective over time. Yet, despite this research, a third to a half of all indigent criminal defendants in this country are not represented by full-time public defenders. This means
that many indigent defendants are structurally disadvantaged in the adversarial process for no other reason than where they live. That is something that can and should be fixed.

Thankfully, some states are moving toward centralized, state-structured indigent defense delivery systems with institutionalized public defender offices. But there is more work to do. It is my hope that the empirical research collected in this Article along with the information about how different states are creatively moving their systems forward will encourage others to consider reforms. Any serious criminal justice reform movement must address the indigent defense crisis, and that conversation should begin with a focus on the structure of indigent defense delivery.
## APPENDIX A: TRIAL-LEVEL INDIGENT DEFENSE DELIVERY SYSTEMS FOR FELONY & MISDEMEANOR CHARGES

<table>
<thead>
<tr>
<th>STATE</th>
<th>WHO CHOOSES DELIVERY METHOD (STATE, LOCALITIES, OR A MIX)?</th>
<th>DESCRIPTION OF DELIVERY SYSTEM (PUBLIC DEFENDER, ASSIGNED-COUNSEL, OR FLAT-FEE CONTRACT MODEL)</th>
<th>DATA RELATING TO THE PERCENTAGE OF CASES HANDLED BY PUBLIC DEFENDERS VERSUS ASSIGNED-COUNSEL/FLAT-FEE CONTRACT SYSTEMS</th>
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| Alabama | Local                                                      | Alabama has only nine public defender offices in the state. The vast majority of counties in Alabama rely on assigned counsel or contract systems.  
From October of 2017 to September of 2018, private attorneys made over 50,000 claims for compensation in counties without public defenders. |                                                                                                                                  |
<p>| Alaska  | Mixed (The state provides for representation, but localities handle defense representation—the Public Defender Agency assumes primary responsibility and has a mix of full-time, salaried Flat-fee contract counsel in Anchorage handle between 4,500–5,000 municipal criminal cases a year, which is more than one fifth of the total caseload of 23,902 cases |                                                                                                                                  |</p>
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<tr>
<th>State</th>
<th>Who Chooses Delivery Method (State, Localities, or a Mix)?</th>
<th>Description of Delivery System (Public Defender, Assigned-Counsel, or Flat-Fee Contract Model)</th>
<th>Data Relating to the Percentage of Cases Handled by Public Defenders versus Assigned-Counsel/Flat-Fee Contract Systems</th>
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<tr>
<td>Alaska [cont.]</td>
<td>tation for municipal ordinance violations.</td>
<td>public defenders and contract attorneys. The Office of Public Advocacy handles conflict cases and relies heavily on contracts with private counsel for direct representation. Neither public defender agency handles municipal ordinance cases, which include jailable misdemeanors like DWI, domestic violence, assault, theft, and vehicle tampering.</td>
<td>handled by both statewide public defender agencies in 2019.</td>
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</tbody>
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| Arizona381 | Local | Ten Arizona counties have public defender offices. The other five counties rely entirely on contracts with private attorneys.382 | Cochise County (Fiscal Year 20/21):  
- Total cases: 3,316  
- Private counsel: 36% (1,214 cases)  
- Public Defender Offices: 64% (Public Defender: 888 cases; Legal Defender: 227 cases; Office of Legal Advocate: 987 cases)  
- Private attorneys handled 14% of felony caseload and the majority of misdemeanor cases.383 |

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380. Wellner, supra note 39; Email from Richard K. Payne to Makayla Lopez, supra note 302; ALASKA DEP’T OF ADMIN. OVERSIGHT & REV. UNIT, supra note 379, at 2 (noting that there were 23,902 cases in Fiscal Year 2019).
382. CARROLL, supra note 135.
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<th>STATE</th>
<th>WHO CHOoses DELIVERY METHOD (STATE, LOCALITIES, OR A MIX)?</th>
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<td>Arizona [cont.]</td>
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<td>Pima County (Fiscal Year 19/20):</td>
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<td></td>
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<td>• Total cases: 14,478</td>
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<td>• Private counsel: almost 23% (3,289 cases)</td>
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<td></td>
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<td></td>
<td>• Public Defender Offices: 77% (Public Defender: 8,861 felony and misdemeanor cases; Legal Defender: 2,022 felony cases; Legal Advocate: 306 felony cases)</td>
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<td>• Private counsel handled 58% of the misdemeanor cases in Pima County.</td>
</tr>
<tr>
<td>Arkansas(^{385})</td>
<td>State</td>
<td>Arkansas has public defender offices in each of its twenty-three judicial circuits, but they contain a mixture of full-time and part-time defenders. Arkansas also has a conflict public defender office in Little Rock and another regional conflict office serving Madison and Washington counties. The Arkansas Public Defense Commission spent $1,260,405.06 on private-at-</td>
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<tr>
<td>State</td>
<td>Who Chooses Delivery Method (State, Localities, or a Mix)?</td>
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<tr>
<td>Arkansas [cont.]</td>
<td>torney appointments in conflict and overflow cases in Fiscal Year 18–19.386</td>
<td>Contract defenders and assigned counsel are the primary method of providing indigent defense in 41% of California counties.390 All of California’s largest counties, and about 75% of its medium-sized counties, have public defender offices. Among the less-populated California counties, about 80% rely on contract defenders.391 In Contra Costa County, which has a public defender office, 22.4% of misdemeanor cases are handled by public defenders.</td>
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<tr>
<td>California387</td>
<td>Local</td>
<td>Thirty-four of California’s fifty-eight counties have full-time public defender offices. One county—San Mateo—has an assigned-counsel system, and the remaining twenty-three counties rely on contract counsel.388 Even in counties with public defender offices, private attorneys will often handle conflict cases through assigned-counsel or contract systems.389</td>
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</table>


390. Eagly et al., supra note 102, at 27.

391. Id. at 28.
<table>
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<tr>
<td>California</td>
<td>Mixed (The state provides representation, but localities handle defense representation for municipal ordinance violations.)</td>
<td>Colorado has both a statewide public defender agency and an Office of the Alternate Defense Counsel (OADC) to handle conflict cases, but OADC is essentially an assigned-counsel system with private-attorney appointments for conflict representation. Colorado’s public defender systems do not typically handle municipal cases. Denver and Aurora have municipal public defender offices, but they rely on assigned counsel for conflict cases, and the rest of the counties in Colorado rely on contract, court-appointed counsel, or managed assigned-counsel programs to cover all jailable municipal offenses.</td>
<td>Cases and 13.5% of felony cases in 2020 were referred to assigned counsel due to conflicts of interest or excessive caseloads.</td>
</tr>
<tr>
<td>Colorado</td>
<td>Mixed (The state provides representation, but localities handle defense representation for municipal ordinance violations.)</td>
<td>Colorado has both a statewide public defender agency and an Office of the Alternate Defense Counsel (OADC) to handle conflict cases, but OADC is essentially an assigned-counsel system with private-attorney appointments for conflict representation. Colorado’s public defender systems do not typically handle municipal cases. Denver and Aurora have municipal public defender offices, but they rely on assigned counsel for conflict cases, and the rest of the counties in Colorado rely on contract, court-appointed counsel, or managed assigned-counsel programs to cover all jailable municipal offenses.</td>
<td>In 2020, the Colorado State Public Defender assigned 9% of its cases to assigned counsel or contract attorneys due to conflicts of interest.</td>
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<td>Connecticut</td>
<td>State</td>
<td>Connecticut has a statewide public defender agency but assigns conflict cases to a panel of private attorneys.</td>
<td>During Fiscal Year 2021, the state public defender transferred 17% of its cases (17,519 out of 102,597 cases) to assigned counsel.</td>
</tr>
<tr>
<td>Delaware</td>
<td>State</td>
<td>Delaware has a statewide public defender agency and also oversees the Office of Conflicts Counsel, which administers flat-fee contracts to cover conflict cases (though certain conditions may trigger an opportunity for counsel to earn an hourly rate above the flat fee).</td>
<td>The Public Defender’s Office represents approximately 83% of indigent defendants, leaving 17% for private/contract counsel.</td>
</tr>
<tr>
<td>Florida</td>
<td>Mixed (Primary representation is locally chosen but the state provides for much of the)</td>
<td>Each of Florida’s twenty judicial circuits has a public defender office and there are five regional conflict defender offices throughout the state with full and part-time staff to handle conflict representation.</td>
<td>Of the 173,403 noncapital cases handled in the circuits in Fiscal Year 21–22, 16,332 (9.4%) involved conflicts of</td>
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<td>Florida [cont.]</td>
<td>conflict representation.</td>
<td>If neither the defender nor the conflict office can handle a case, there is a panel of private assigned counsel available to be paid an hourly rate.</td>
<td>interest that required appointment of private counsel.</td>
</tr>
<tr>
<td>Georgia 406</td>
<td>Local</td>
<td>Each of the fifty judicial circuits in the state has one circuit defender appointed by a local panel of attorneys. The circuit defender then hires assistant defenders. When there is a conflict of interest in a case, it can be sent to another circuit defender office or sent out to private counsel. Six of the circuits—Gwinnett, Bell-Forsyth, Blue Ridge, Cobb, Douglas, and Houston—have opted out of the system.</td>
<td></td>
</tr>
<tr>
<td>Hawaii 408</td>
<td>State</td>
<td>Hawaii has a statewide public defender agency and uses an assigned-counsel system for conflict cases.</td>
<td>Between January 1, 2021, and December 31, 2022, public defenders handled 73.6% of all criminal cases (4,257 out</td>
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409. Id. §§ 802-5(a), 802-8.
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<tr>
<td>Hawaii [cont.]</td>
<td></td>
<td></td>
<td>of 5,781) while court-appointed counsel handled 11.7% (678 out of 5,781).</td>
</tr>
<tr>
<td>Idaho</td>
<td>Local</td>
<td>Only fourteen of Idaho’s forty-four counties have public defender offices. The other thirty counties contract with private attorneys to provide indigent defense services. One county with a public defender office has a conflict public defender office (Bonneville). All of the others contract with private attorneys to handle conflict cases.</td>
<td>In 2021, contract counsel handled 28% of felony and misdemeanor cases in the state (17,949 out of 63,569 cases).</td>
</tr>
<tr>
<td>Illinois</td>
<td>Local</td>
<td>Every county in Illinois has a public defender office, but 57 of the 102 counties have part-time defenders, many of whom work under fixed-fee contracts.</td>
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413. Id.  
417. Illinois Report, supra 63, at 28, 46, 144.
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<tr>
<td>Indiana*418</td>
<td>Local</td>
<td>Indiana has a mix of public defender offices, contract systems, and assigned-counsel programs.419 Sixty-seven of Indiana’s ninety-two counties have a county public defender board and a comprehensive plan for indigent defense such that they receive state funding for noncapital indigent defense.420 These sixty-seven counties do not necessarily have public defender offices. They may have a comprehensive plan that relies on contract attorneys or assigned counsel paid by the hour. And even those with public defender offices still rely on contract attorneys or assigned counsel for conflict cases.421 Of the remaining twenty-five counties, only three (Henry, Montgomery, and Wayne) have public defender offices. Those three counties</td>
<td>2021 data collected from sixty-seven of the state’s ninety-two counties (which account for approximately 75% of the state’s population) reveal that 35% of both the felony caseload (14,789 of 41,829 cases) and the misdemeanor caseload (11,362 of 32,759 cases) were handled by contract attorneys or assigned counsel.422</td>
</tr>
</tbody>
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418. IND. CODE. ANN. §§ 33-40-1-1 to 33-40-1-6 (West 2018).
419. INDIANA REPORT, supra note 63; CARROLL, supra note 135.
421. See id.; see also County Eligibility Status for Reimbursement in Non-Capital Cases, INDIANA PUB. DEF. COMM’N (2023), https://www.in.gov/publicdefender/county-eligibility-status/ [perma.cc/C5J6-UURF].
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<td>Indiana [cont.]</td>
<td>constitute 2.3% of Indiana’s population.423</td>
<td>In Iowa, there is a statewide public defender agency and contract attorneys are used to handle conflict cases.425</td>
<td>According to a 2020 report, public defenders handled 91,758 charges while contract attorneys filed 67,234 claims for payment.426 The State Public Defender estimates that half of their cases are handled by contract attorneys.427</td>
</tr>
<tr>
<td>Iowa424</td>
<td>State</td>
<td>There is a statewide public defender agency that handles some felony cases and contracts with private attorneys to handle the remaining felony caseload. And there are assigned-counsel systems in place to handle conflicts.429 Misdemeanors are handled primarily by private counsel at the county level.</td>
<td>According to the Board of Indigent Defense Services 2020 Annual Report, public defenders handled 44% of the felony cases statewide (11,456 felony cases) whereas private appointed counsel handled 56% (14,781 felony cases).430</td>
</tr>
<tr>
<td>Kansas428</td>
<td>Mixed (The state provides for felony representation, but localities provide representation for misdemeanors.)</td>
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424. *Iowa Code §§ 13B.1 to 13B.13, 815.1 (2023).*


426. *Id.*


428. *See KAN. STAT. ANN. §§ 22-4501 to 22-4529 (2007); KAN. ADMIN. REGS. §§ 105-1-1 to 105-31-6 (2022).*

429. *KAN. BD. OF INDIGENTS’ DEF. SERVS., A REPORT ON THE STATUS OF PUBLIC DEFENSE IN KANSAS 10 (2020).*

430. *See KAN. STATE BD. OF INDIGENTS’ DEF. SERVS., supra note 429, at 1.*
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<td>Kansas [cont.]</td>
<td>through flat-fee contracts or assigned-counsel systems.431</td>
<td>The Kentucky Department of Public Advocacy (DPA) is a statewide public defender agency that handles indigent defense representation throughout the state, with the exception of Louisville, where the Louisville Metro Public Defender Office has a separate contract to provide indigent defense services. Both DPA and the Louisville Metro Defenders contract with private counsel for conflict representation.</td>
<td>According to a 2021 report, DPA handled 96% of the cases (131,365 out of 136,820) throughout the state.434</td>
</tr>
<tr>
<td>Kentucky432</td>
<td>Mixed (Predominantly state-provided with the exception of Louisville, which has its own delivery system.)433</td>
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<tr>
<td>Louisiana435</td>
<td>Local</td>
<td>In Louisiana, most indigent defense representation is provided through flat-fee contracts.436 In 2016, forty of the forty-two districts reported Contract attorneys handle a majority of the cases.</td>
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</table>

431. See e.g., Memorandum from Katie Jackson, City Att’y, to the City Comm’n, Amendment to Agreement for Public Defender Services (May 7, 2018), https://www.cityofmhk.com/DocumentCenter/View/50312/Item-4M-Amend-Public-Defender-Contract?bidId= [perma.cc/RMD6-W82D].
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<td>Louisiana</td>
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<td>that they relied, at least in part, on part-time contract attorneys to provide for indigent defense. And the majority of attorneys doing public defender work in the state are part-time contract attorneys who also maintain private practices on the side.</td>
<td></td>
</tr>
<tr>
<td>Maine</td>
<td>State</td>
<td>Maine has a statewide assigned-counsel program. Assigned counsel handled 28,571 cases in 2021.</td>
<td>Almost 100% are assigned counsel or contract.</td>
</tr>
<tr>
<td>Maryland</td>
<td>State</td>
<td>Maryland has a statewide public defender office and assigns conflict-of-interest cases to private attorneys who work as assigned counsel. The statewide system experimented with flat-fee contracting to reduce caseloads. In 2018, it piloted a work reduc-</td>
<td>In 2021, the public defenders handled 92% of the caseload (119,356 out of 129,175 cases).</td>
</tr>
</tbody>
</table>

437. Id.
438. See LA. PUB. DEF. BD., THE LPDB FISCAL LANDSCAPE 5 (2018) (noting that, as of June 30, 2018, there were 192 full-time attorneys, 91 public defense attorneys who worked 30+ hours per week, 311 part-time attorneys who work 10–29 hours per week, and 58 attorneys who worked sporadically on indigent defense matters). See generally LA. PUB. DEF. BD., LPDB 2021 ANNUAL BOARD REPORT (2022).
441. See MD. CODE ANN., CRIM. PROC. §§ 16-101 to 16-403 (West 2016).
442. Id. § 16-208.
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<tr>
<td>Massachusetts</td>
<td>State</td>
<td>Massachusetts has a statewide system that relies predominantly on a managed assigned-counsel system with full-time public defenders handling a minority of the cases statewide.</td>
<td>Public defenders handle 20% of cases and assigned counsel handle 80%.</td>
</tr>
<tr>
<td>Michigan</td>
<td>Local</td>
<td>Only thirty-two of Michigan’s eighty-three counties have public defender offices and some of them do not handle a majority of the docket.</td>
<td>The majority are assigned counsel or contract. The Research Director at the Michigan Indigent Defense Commission estimates that</td>
</tr>
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446. See [id.](https://www.mass.gov/sitefiles/000175561000000.pdf)


450. [SIEGEL, supra note 368, at 9–10.](https://books.google.com/books?id=9RJCAAAAMBAJ&pg=PA9&lpg=PA9&dq=%22SIEGEL%2C+supra+note+368%2C+at+9%E2%80%9310%22&source=bl&ots=Jf6FQfJG0b&sig=mGQkzv95RwJz7jCTqQFmQc3Y95E&hl=en&sa=X&ved=2ahUKEwj_sPZK6ZLyAhWTzBcKHDRQAv0Q6AEwEnoECAcQAQ#v=onepage&q=%22SIEGEL%2C%20supra%20note%20368%2C%20at%209%E2%80%9310%22&f=false)
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<td>Michigan [cont.]</td>
<td>assigned-counsel systems in Michigan. And a number of counties still rely on contracts.</td>
<td>public defender offices handle about 27% of indigent defense cases with the remaining 73% handled by assigned or contract counsel. Full-time public defenders in Wayne County—which includes the city of Detroit—handle only 35% of the county’s indigent defense caseload with the remaining cases going to assigned counsel.</td>
<td></td>
</tr>
<tr>
<td>Minnesota</td>
<td>State</td>
<td>Minnesota uses a combination of full-time public defenders and part-time defenders that operate like contract attorneys with private practices on the side. According to a 2010 report, about half of the state’s public defenders worked part-time and had separate private practices.</td>
<td></td>
</tr>
<tr>
<td>Mississippi</td>
<td>Local</td>
<td>According to a 2018 report, seven counties in Mississippi have full-time public defender offices, twelve counties pay private counsel an</td>
<td>The majority are assigned counsel or flat-fee contracts.</td>
</tr>
</tbody>
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452. Email from Jonah Siegel to Eve Primus, supra note 369.
453. WAYNE CNTY. INDIGENT DEF. SERVS., supra note 449.
454. See MINN. STAT. §§ 611.14 to 611.273, 611.35 (2022).
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<td>Mississippi [cont.]</td>
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<td>hourly rate to handle indigent defense cases, and the remaining sixty-three counties have flat-fee contracts with private counsel.</td>
<td>Even the seven counties with public defenders resort to assigned-counsel or contract systems for conflict cases. A 2016 report from the Mississippi Office of the Public Defender indicated that full-time public defenders were the primary delivery system in only 9% of the state.</td>
</tr>
<tr>
<td>Missouri</td>
<td>Mixed (The state provides representation, but localities handle defense representation for municipal ordinance violations.)</td>
<td>Missouri has a statewide public defender system but uses contract counsel for conflicts.</td>
<td>In Fiscal Year 2021, contract attorneys handled approximately 19% of the caseload (12,094 out of 63,094 cases).</td>
</tr>
<tr>
<td>Montana</td>
<td>State</td>
<td>The majority of counties in Montana provide indigent defense representation (state).</td>
<td>In Fiscal Year 2021, contract counsel handled 23% of the felony and misdemeanor caseload.</td>
</tr>
</tbody>
</table>

457. MISSISSIPPI REPORT, supra note 63, at iv.


459. See id. at 20–23.

460. See id.


462. Id. § 600.042.4(6).

463. Id. § 600.042.1(10).


466. Id. § 47-1-401(1)–(2).
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<td>Montana [cont.]</td>
<td>fense through contracts, although some larger counties have public defender offices.</td>
<td>cases statewide (6,168 out of 26,355 cases).</td>
<td></td>
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<tr>
<td>Nebraska&lt;sup&gt;469&lt;/sup&gt;</td>
<td>Local&lt;sup&gt;470&lt;/sup&gt;</td>
<td>A 2006 report indicated that elected public defender systems existed in twenty-four counties (26%), contract defenders in eighteen counties (19%), and assigned-counsel systems in fifty-one counties (55%).&lt;sup&gt;471&lt;/sup&gt; Not all elected defenders work full-time and many have private practices on the side.&lt;sup&gt;472&lt;/sup&gt; At least one public defender office in the state (in Sarpy County, which accounts for 10% of the state population)&lt;sup&gt;473&lt;/sup&gt; does not handle misdemeanor cases anymore, relying on private attorneys to In 2020, the Lancaster Public Defender Office assigned 34% of its felony cases (637 out of 1,881 cases) and 16% of its misdemeanor cases (395 out of 2,535 cases) to private assigned counsel due to conflicts of interest.&lt;sup&gt;474&lt;/sup&gt;</td>
<td></td>
</tr>
</tbody>
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<sup>467</sup> Montana, SIXTH AMEND. CTR., https://sixthamendment.org/ know-your-state/montana/ [perma.cc/5Q95-92DM].


<sup>469</sup> See NEB. REV. STAT. §§ 23-3401 to 23-3408, 29-3901 to 29-3908, 29-3909 to 29-3918, 29-3919 to 29-3930 (2023).

<sup>470</sup> Id. § 23-3405.

<sup>471</sup> NEB. MINORITY JUST. COMM., REPORT TO THE NEBRASKA SUPREME COURT ON INDIGENT DEFENSE SYSTEMS AND FEE STRUCTURES 5 tbl.2 (2006), https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1032&context=publicpolicypublications [perma.cc/Z4E9-BBK3].

<sup>472</sup> See id. at 25 tbs. 23 & 24.


<sup>474</sup> Id.
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<td>Nebraska [cont.]</td>
<td>handle those cases. 475 Conflict cases, which can be large parts of the docket in some parts of Nebraska, are transferred to private assigned counsel. 476</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nevada 477</td>
<td>Mixed (The state handles delivery in a small number of counties and localities choose in the others.)</td>
<td>The majority of counties in Nevada rely on contract attorneys, but there are public defenders in the big cities, so more of the cases statewide are handled by public defenders. 478</td>
<td></td>
</tr>
<tr>
<td>New Hampshire 479</td>
<td>State</td>
<td>New Hampshire has a statewide public defender office, but relies on assigned counsel and contract defenders for conflict and overflow cases. 480</td>
<td>Public defenders handle 85–88% of cases and assigned counsel and contract defenders take the remaining 12–15%. 481</td>
</tr>
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480. See id. § 604-B:3 (addressing conflicts of interest); id. § 604-B:6 (addressing overflow cases).

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<td>New Jersey482</td>
<td>Mixed (The state provides for felony representation, but localities provide representation for misdemeanors.)</td>
<td>New Jersey has a statewide indigent defense program for felonies, but misdemeanors are handled by each county.483 There are also assigned-counsel panels for conflict cases.</td>
<td></td>
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<tr>
<td>New Mexico484</td>
<td>Mixed (The state provides representation, but localities handle defense representation for municipal ordinance violations.)485</td>
<td>New Mexico has a statewide public defender system that serves the more urban areas and the agency relies on flat-fee contracts with private attorneys in rural areas.486</td>
<td>In 2021, contract attorneys handled about 39% of adult criminal cases (14,798 out of 37,901 cases).487</td>
</tr>
<tr>
<td>New York488</td>
<td>Mixed (The state handles delivery in five counties and localities)</td>
<td>Counties use a mix of public defender offices and assigned-counsel systems.489</td>
<td>Roughly 33% of indigent defense cases in the state (excluding five counties that report separately due to</td>
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<tr>
<td>New York [cont.]</td>
<td>choose in others.)</td>
<td>Contract and assigned-counsel models predominate. Eighty-two of the 100 counties use assigned-counsel systems (fifty-two use it as primary model; thirty use it as back up to a public defender system). Thirteen counties use contract models as their primary method and another five use contracts as a backup to a public defender system. In 2011, the state legislature pushed counties to move away from assigned-counsel systems to contract systems to handle cases.</td>
<td>During 2019–2020, public defender offices handled approximately 33% of the indigent caseload while private counsel handled approximately 64%.</td>
</tr>
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| North Carolina | Local | | |


495. OFF. OF INDIGENT DEF. SERVS., ANNUAL REPORT OF THE COMMISSION ON INDIGENT DEFENSE SERVICES 9 (2020).
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<th>DESCRIPTION OF DELIVERY SYSTEM (PUBLIC DEFENDER, ASSIGNED-COUNSEL, OR FLAT-FEE CONTRACT MODEL)</th>
<th>DATA RELATING TO THE PERCENTAGE OF CASES HANDLED BY PUBLIC DEFENDERS VERSUS ASSIGNED-COUNSEL/FLAT-FEE CONTRACT SYSTEMS</th>
</tr>
</thead>
<tbody>
<tr>
<td>North Carolina [cont.]</td>
<td>save money.496 As of 2014, eighteen counties used contracts.497</td>
<td>North Dakota has seven full-time defender offices, but it relies on private assigned counsel for conflicts and to handle services in areas not covered by defender offices.499 For example, as of 2019, the Minot Public Defender Office had five full-time public defenders and three private contract attorneys.500</td>
<td></td>
</tr>
<tr>
<td>North Dakota498</td>
<td>Mixed (The state provides representation, but localities handle defense representation for municipal ordinance violations.)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ohio501</td>
<td>Mixed (Localities choose how to deliver services but ten of the state’s eighty-eight counties have contracted with Ten of the state’s eighty-eight counties contract with the statewide public defender office to provide trial-level services. Six of those counties are serviced by private attorneys with whom the state contracts</td>
<td>As of 2019, in Lucas County, roughly 66% of indigent defendants were assigned to private counsel and roughly 33% were handled by the public defender’s office.502</td>
<td></td>
</tr>
</tbody>
</table>


497. OFF. OF IND. DEF. SERVS., supra note 496, at 4.

498. See N.D. CENT. CODE §§ 54-61-01 to 54-61-05 (2021); see also GUIDELINES TO DETERMINE ELIGIBILITY FOR INDIGENT DEFENSE SERVICES 3 (2021), https://www.indigents.nd.gov/sites/www/files/documents/Guidelines%20version%202021.pdf [perma.cc/34W3-F8RG].

499. See Attorney Services, N.D. COMM’N ON LEGAL COUNS. FOR INDIGENTS, https://www.indigents.nd.gov/attorney-services [perma.cc/GB8L-4GNU].


501. See OHIO REV. CODE §§ 120.01 to 120.39 (2023).

<table>
<thead>
<tr>
<th>State</th>
<th>Who Chooses Delivery Method (State, Localities, or a Mix)?</th>
<th>Description of Delivery System (Public Defender, Assigned-Counsel, or Flat-Fee Contract Model)</th>
<th>Data Relating to the Percentage of Cases Handled by Public Defenders versus Assigned-Counsel/Flat-Fee Contract Systems</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ohio [cont.]</td>
<td>the state for the state to provide services.)</td>
<td>and four have public defender offices. The other seventy-seven counties rely on a mix of contract, assigned-counsel, and public defender models.</td>
<td></td>
</tr>
<tr>
<td>Oklahoma504</td>
<td>Mixed (State-run for seventy-five of the seventy-seven counties, but two of the most populous counties have their own systems.)505</td>
<td>The state relies on a combination of flat-rate contracts, public defender offices with salaried attorneys, and assigned-counsel systems. Tulsa and Oklahoma City are the most populous counties and have full-time public defenders but rely on assigned counsel for conflict representation.</td>
<td>In the state-run offices that cover seventy-five of Oklahoma’s seventy-seven counties, only 17.5% of cases (9,775 out of 55,973) were handled by full-time public defenders.506</td>
</tr>
<tr>
<td>Oregon507</td>
<td>Mixed (The state provides representation, but localities handle defense representation for municipal ordinance violations.)</td>
<td>Oregon is the only statewide contract system. The state contracts with a mix of nonprofit public defense offices, sole practitioners, private firms, and consortia of private attorneys. The contract system does not cover misdemeanor offenses in municipal courts. Those are handled through flat-fee contracts with private providers.</td>
<td>A 2019 report from the Sixth Amendment Center suggests that a significant percentage of indigent defense cases are handled through flat-fee contracts or assigned-counsel systems. In 2018–2019, the state contracted with sixty-three contractors and only ten of them were public defense providers. Those ten public defender offices employed only one third of the total lawyers covered by the state-run offices that cover seventy-five of Oklahoma’s seventy-seven counties, only 17.5% of cases (9,775 out of 55,973) were handled by full-time public defenders.506</td>
</tr>
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<table>
<thead>
<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>Oregon [cont.]</td>
<td></td>
<td>counsel. The Eugene Municipal Court had 3,731 filings in 2019.508</td>
<td>statewide contracts those years (211 out of 639 attorneys).509</td>
</tr>
<tr>
<td>Pennsylvania510</td>
<td>Local</td>
<td>Most counties have public defender offices that have a mix of full and part-time attorneys. And most public defender offices do not handle all indigent defense cases in their counties. In all counties, private attorneys handle conflicts on an hourly or contract basis.511</td>
<td>The Defender Association of Philadelphia represents almost 70% of adult and juvenile defendants, leaving 30% to assigned/contract counsel.512</td>
</tr>
<tr>
<td>Rhode Island514</td>
<td>Mixed (The state provides representation, but localities handle defense representation)</td>
<td>Rhode Island has a statewide public defender office with conflict cases handled by private attorneys.513</td>
<td></td>
</tr>
</tbody>
</table>

509. See Oregon Report, supra note 86, at 32.
<table>
<thead>
<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>Rhode Island [cont.]</td>
<td>tation for municipal ordinance violations. 516</td>
<td></td>
<td></td>
</tr>
<tr>
<td>South Carolina 517</td>
<td>Local</td>
<td>There are sixteen circuit public defenders who are in charge of public defender offices in different judicial circuits. Each county uses assigned counsel for conflict representation. 518</td>
<td>In sixty-three counties, 100% of the caseload is handled by private counsel. In Minnehaha County (which is South Dakota’s most populous county), private counsel handled almost 9% (983 out of 11,243) of the cases in 2020. 521</td>
</tr>
<tr>
<td>South Dakota 520</td>
<td>Local</td>
<td>South Dakota seems to rely primarily on private attorneys for indigent defense. Only three of the state’s sixty-six counties have public defender offices—Lawrence County, Minnehaha County, and Pennington County. The public defender offices use assigned-counsel</td>
<td></td>
</tr>
</tbody>
</table>

517. See S.C. CODE ANN. §§ 17-3-5 to 17-3-600 (2014).
<table>
<thead>
<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>South Dakota [cont.]</td>
<td>systems for at least some conflict cases.\textsuperscript{522}</td>
<td></td>
<td>Only 17.22% of juvenile delinquency cases statewide are handled by public defenders.\textsuperscript{524}</td>
</tr>
<tr>
<td>Tennessee\textsuperscript{523}</td>
<td>Local</td>
<td>Each district in Tennessee has a public defender and relies on assigned counsel for conflicts or overflow.</td>
<td>In 2021, public defenders handled less than 16% of felony and misdemeanor cases statewide (51,189 out of 322,719).\textsuperscript{527}</td>
</tr>
<tr>
<td>Texas\textsuperscript{525}</td>
<td>Local</td>
<td>The majority of the 254 counties in Texas rely on assigned-counsel systems with private attorneys being paid hourly or at a set rate per case.\textsuperscript{526}</td>
<td></td>
</tr>
<tr>
<td>Utah\textsuperscript{528}</td>
<td>Local</td>
<td>Utah has three public defense nonprofits that contract with three counties to provide indigent defense. Everywhere else relies on contract or assigned-counsel, which often means flat-fee contract systems.\textsuperscript{529}</td>
<td>In District and Justice Courts in Utah, almost 45% of cases are assigned to contract attorneys or assigned counsel. (That percentage does not include cases that the public defender offices send to private</td>
</tr>
</tbody>
</table>


\textsuperscript{523} See TENN. CODE ANN. §§ 8-14-101 to 8-14-401 (2023); TENN. SUP. CT. R. 13.

\textsuperscript{524} See 1 TEx. ADMIN. CODE §§ 173.101 to 173.402 (2017), 174.1 to 174.28; TEx. CODE CRIM. PROC. ANN. arts. 1.05 to 1.051 (West 2005 & Supp. 2022), 26.04-26.06 (West 2009 & Supp. 2022); TEx. GOV’T CODE ANN. 79.001 to 79.042 (West 2023).

\textsuperscript{525} See Burkhart, supra note 24, at 4.


\textsuperscript{527} Utah REPORT, supra note 63, at xi–xii (2021).
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</tr>
</thead>
<tbody>
<tr>
<td>Utah [cont.]</td>
<td></td>
<td>counsel due to conflicts of interest.</td>
<td></td>
</tr>
<tr>
<td>Vermont⁵³¹</td>
<td>State</td>
<td>Vermont has seven full-time public defense offices with the remaining offices staffed by private firms or attorneys under contract.⁵³²</td>
<td>According to 2021 data, contract/private counsel handled 40% of the misdemeanor and felony cases in the state (2,707 out of 6,759).⁵³³</td>
</tr>
<tr>
<td>Virginia⁵³⁴</td>
<td>State</td>
<td>Virginia has a statewide commission that provides for indigent defense through twenty-eight public defender offices and a statewide roster of private attorneys for conflicts, overflow, and places that don’t have public defenders.</td>
<td>It seems that private attorneys are handling 31% of the offenses charged.⁵³⁵</td>
</tr>
<tr>
<td>Washington (state)⁵³⁶</td>
<td>Local</td>
<td>According to a 2019 report, twelve counties have public defender agencies and most of them take the majority of cases with conflict or</td>
<td>It appears that private attorneys handle at least 33% of the felony and misdemeanor cases.⁵³⁶</td>
</tr>
</tbody>
</table>

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535. According to the Commission’s 2021 report, the public defender offices handled 70,863 cases that year that included 135,067 charges. VA. INDIGENT DEF. COMM’N, 2021 ANNUAL REPORT, app. A. A 2021 report from the executive secretary of the Virginia Supreme Court indicates that court-appointed counsel handled a total of 196,877 charges that year. SUP. CT. OF VA., QUARTERLY REPORT PURSUANT TO VA. CODE § 19.2-163 (2021), https://rga.lis.virginia.gov/Published/2021/RD288/PDF [perma.cc/3NU7-5MRQ]. If the public defender handled 135,067 charges, that left 61,810 charges for appointed counsel, which is almost a third of the total number of charges.

536. See WASH. REV. CODE §§ 2.70.005 to 2.70.900, 10.101.005 to 10.101.900 (2022); WASH. BAR ASS’N, STANDARDS FOR INDIGENT DEF. (2021).
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</tr>
</thead>
<tbody>
<tr>
<td>Washington (state) [cont.]</td>
<td>overflow cases going to assigned counsel; four counties contract with nonprofit public defense corporations to do defender work and use private counsel for conflicts or overflow; the remaining twenty-three counties use contract or assigned-counsel systems.537</td>
<td>cases in the state (including municipal offenses).539</td>
<td></td>
</tr>
<tr>
<td>Washington, D.C.540</td>
<td>Run at the district level (comparable to the state choosing the delivery system)</td>
<td>Most cases are handled by assigned counsel, although the Public Defender Service handles a majority of the more serious cases.541</td>
<td>The Public Defender Service represents about 15% of the indigent defense cases in the district and the assigned-counsel system handles the other 85%.542</td>
</tr>
</tbody>
</table>


538. See id. The 2019 Status Report includes the caseloads for each county, so this data counts as private-attorney cases only those from counties that do have institutional public defender offices. Counted that way, private attorneys handled 23% (19,661 of the 85,216 cases) of the felony and misdemeanor cases and they handled the majority (57%) of the municipal cases (17,978 out of 31,533 cases). Combined, this means that private attorneys handled 32% of the total cases (37,639 of the 116,749 cases). And that number must understate private attorneys' total caseloads since it does not account for jurisdictions with public defender offices that send conflict cases out to the private bar.

539. See id. at 64–96.


542. Id. at 414–15.
<table>
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</thead>
<tbody>
<tr>
<td>West Virginia</td>
<td>State</td>
<td>West Virginia operates with a mix of public defender and assigned-counsel systems.</td>
<td>Private attorneys seem to handle about 33% of the misdemeanor cases.</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>State</td>
<td>Wisconsin has a statewide public defender office and also relies on private assigned counsel through hourly rates and contracts.</td>
<td>Private attorneys handled approximately 40% of the indigent defense caseload in 2018 (55,804 out of 140,440 cases).</td>
</tr>
<tr>
<td>Wyoming</td>
<td>State</td>
<td>Wyomining has a statewide public defense system and only uses private counsel for conflict cases.</td>
<td>Private counsel handled 14% of the indigent defense docket in 2014.</td>
</tr>
</tbody>
</table>


544. Unfortunately, the West Virginia Public Defender Reports don’t compare assigned-counsel cases to public defender cases. Instead, they track the number of claims filed by assigned counsel and the number of cases handled by public defenders. For felony cases, it is highly possible that assigned counsel will file multiple claims per case. That is less likely in misdemeanor cases. According to 2019 data, appointed counsel filed 9,361 claims in misdemeanor cases statewide as compared to the 18,530 misdemeanor cases that public defender offices handled. PUB. DEF. SERVS., 2019 ANNUAL REPORT 42, 86, https://pds.wv.gov/about/Reports/Documents/FY2019%20-%20Annual%20Report.pdf [perma.cc/N75T-8FH2]. Although not a perfect comparison, assuming that assigned counsel typically files one claim for a misdemeanor case, assigned counsel handle about a third of the misdemeanor caseload.

545. See WIS. STAT. §§ 977.01 to 977.09 (2023); WIS. ADMIN. CODE PD §§ 1.01 to 8.03 (2023); WIS. SUP. CT. R. 81.01 to 81.02.

546. WIS. STAT. § 977.08 (2023); WIS. SUP. CT. R. 81.02.

547. See STATE OF WIS. PUB. DEF. BD., AGENCY BUDGET REQUEST 2019–2021 BIENNIAL 39 (2018) (noting that public defender staff attorneys were assigned to 84,636 of the 140,440 total cases with 55,804 cases being handled by the private bar).

548. See WYO. STAT. ANN. §§ 7-6-101 to 7-6-114 (2023).


APPENDIX B: HOURLY RATES, FLAT RATES, AND FEE CAPS’ FOR ASSIGNED-COUNSEL SYSTEMS BY STATE (FOR ADULT FELONY AND MISDEMEANOR CASES)

<table>
<thead>
<tr>
<th>State</th>
<th>Hourly Rate or Flat Rate</th>
<th>Maximum Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>$70 per hour</td>
<td>Class A Felony: $4,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Class B Felony: $3,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Class C Felony: $2,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Misdemeanors: $1,500</td>
</tr>
<tr>
<td>Alaska</td>
<td>Rates assigned by Office of Public Advocacy (typically $65–100 per hour)</td>
<td>Class A Felony: $9,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Class B Felony: $4,875</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Class C Felony: $4,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Misdemeanors: $1,625</td>
</tr>
<tr>
<td>Arizona</td>
<td>(Varies by county)</td>
<td>None</td>
</tr>
<tr>
<td>Maricopa County</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>$77 per hour for major felonies (such as murder or manslaughter)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Uses a flat fee for other charges (Class 1, 2, 3 felony: $1,375; Class 4, 5, 6 felony: $1,000; Misdemeanor: $450)</td>
<td></td>
</tr>
<tr>
<td>Cochise County</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>First Degree Murder: $75 per hour</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Felony: The greater of $1,000 per case or $100 per hour after ten hours</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Misdemeanor: $200 per case</td>
<td></td>
</tr>
</tbody>
</table>

* These maximum fees may not represent hard caps in every jurisdiction. Attorneys may sometimes petition to obtain money above these maximums in extraordinary cases, but figures in this column represent a judgment by the jurisdiction about the upper limit for a typical case.

551. See ALA. CODE § 15-12-21(d) (2018).
552. ALASKA ADMIN. CODE tit. 2, § 60.010 (2023).
554. GIDEON AT 50, supra note 50, at 20.
<table>
<thead>
<tr>
<th>State</th>
<th>Hourly Rate or Flat Rate</th>
<th>Maximum Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arkansas</td>
<td>Hourly:</td>
<td>None</td>
</tr>
<tr>
<td></td>
<td>• Class A or Y Felony: $70–90</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Other Felony: $60–80</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Misdemeanor: $50–80</td>
<td></td>
</tr>
<tr>
<td>California</td>
<td>(Varies by county)</td>
<td>None</td>
</tr>
<tr>
<td></td>
<td>San Francisco Superior Court Indigent Defense Administration (hourly):</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Serious felonies: $106</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Felonies: $89</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Misdemeanors: $66</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Los Angeles County Independent Defender Program (hourly):</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Misdemeanors: $83</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Grade 1 Felony: $89</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Grade 2 Felony: $95</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Grade 3 Felony: $103</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Grade 4 Felony: $117</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Grade 5 Felony: Assigned instead through the Capital Case Panel rotation; rate unknown</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Sexually Violent Predator: $128</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Early Disposition: $256</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Duty Day Per-Diem Rates:</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Misdemeanor (full day): $418</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Misdemeanor (half day): $219</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Felony (full day): $418</td>
<td></td>
</tr>
</tbody>
</table>

557. GIDEON AT 50, supra note 50, at 20.
558. Id. at 21.
561. See CAL. PENAL CODE § 987.2(a) (West 2021).
<table>
<thead>
<tr>
<th>State</th>
<th>Hourly Rate or Flat Rate</th>
<th>Maximum Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>California [cont.]</td>
<td>• Felony (half day): $219</td>
<td>• Class 1 Felonies with trial/without trial: $37,760/$18,880</td>
</tr>
<tr>
<td>Colorado</td>
<td>Hourly:</td>
<td>• Class 2 Felonies with trial/without trial: $16,520/$8,260</td>
</tr>
<tr>
<td></td>
<td>• Type A Felony: $105</td>
<td>• Class 3–6 Felonies with trial/without trial: $10,620/$5,310</td>
</tr>
<tr>
<td></td>
<td>• Type B Felony: $100</td>
<td>• Misdemeanors with trial/without trial: $4,720/$2,360</td>
</tr>
<tr>
<td></td>
<td>• Misdemeanor: $95</td>
<td></td>
</tr>
<tr>
<td>Connecticut</td>
<td>Most cases are handled through flat-rate contracts:</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Class A &amp; B Felonies: $1,000 per case</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Class C Felonies &amp; Misdemeanors: $350 per case</td>
<td></td>
</tr>
<tr>
<td></td>
<td>However, when handled hourly:</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Felony: $75</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Misdemeanor: $50</td>
<td></td>
</tr>
<tr>
<td>Delaware</td>
<td>$60 per hour</td>
<td>Felonies: $2,000 Misdemeanors: $1,000</td>
</tr>
<tr>
<td>Florida</td>
<td>Flat rate that varies depending on charge:</td>
<td>Life felony: $9,000 Nonlife Felony: $6,000 Misdemeanors: $1,000</td>
</tr>
<tr>
<td></td>
<td>• Life felony: $2,500</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Felony: $750 to $1,500</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Misdemeanor: $400</td>
<td></td>
</tr>
<tr>
<td>Georgia</td>
<td>(Varies by county)</td>
<td></td>
</tr>
</tbody>
</table>

562. OFF. OF THE CHIEF JUST., SUP. CT. OF COLO., CHIEF JUSTICE DIRECTIVE 04-04, ALTERNATE DEFENSE COUNSEL MAXIMUM HOURLY RATES attach. D (2023), https://www.courts.state.co.us/Courts/Supreme_Court/Directives/04-04_Amended%20effective%20July%202023%20Attach%20B%20Amended%204.%202023%20Attach%20D%20Amended%20Eff%204.1.2023%20WEB.pdf [perma.cc/7Y5B-ZS39].

563. ASSIGNED COUNSEL AGREEMENTS, CONN. STATE DIV. OF PUB. DEF. SERVS., https://portal.ct.gov/OCPD/Assigned-Counsel/xAssigned_Counsel_Annual_Agreements [perma.cc/A2AX-RS8L].

564. DEL. SUPER. CT. CRIM. R. 44(e)(2).

565. GIDEON AT 50, supra note 50, at 22.

566. FLA. STAT. § 27.5304 (2022).

<table>
<thead>
<tr>
<th>State</th>
<th>Hourly Rate or Flat Rate</th>
<th>Maximum Fee</th>
</tr>
</thead>
</table>
| Georgia [cont.] |  **Gwinnett County:**  
|               | • Serious felonies: $65 per hour  
|               | • Other cases: $55 per hour in court and $45 per hour out of court                     |                                       |
|               |  **Cobb County:**  
|               | • Felonies: $60 per hour in court and $50 per hour out of court  
|               | • Misdemeanors: $60 per hour in court and $45 per hour out of court                  |                                       |
|               |  **Forsyth County:**  
|               | • $75 per hour in court and $65 per hour out of court                                 |                                       |
|               |  **Cherokee County:**  
|               | • Ranges from $65–85                                                                  |                                       |
|               |  **City of Winder:**  
|               | • $60 per hour in court and $45 per hour out of court                                |                                       |
| Hawaii        | $90 per hour                                                                        | Felony: $6,000  
|               |                                                                                      | Misdemeanor Jury Trial: $3,000       |
|               |                                                                                      | Misdemeanor: $1,500                   |
|               |                                                                                      | Petty Misdemeanor: $900               |
| Illinois      |  **Cook County**  
|               | $40 per hour in court  
|               | $30 per hour out of court                                                            | Cook County:  
|               |                                                                                      | • Felony: $1,250                      |
|               |                                                                                      | • Misdemeanor: $150                   | For other parts of Illinois:  
|               |                                                                                      | • Misdemeanor: $750                   |
|               |                                                                                      | • Felony: $5,000                      |
|               | All other counties establish “reasonable” hourly rates of their own:  
|               | • **Hardin County:** $70\textsuperscript{571}                                       |                                       |

\textsuperscript{568} HAW. REV. STAT. ANN. § 802-5 (LexisNexis 2016).
\textsuperscript{569} 725 ILL. COMP. STAT. ANN. 5 / 113-3(c) (West 1993).
\textsuperscript{570} ILLINOIS REPORT, supra note 63, at 31.
\textsuperscript{571} Id. at 73.
\textsuperscript{572} ILL. SUP. CT. R. 299(c).
<table>
<thead>
<tr>
<th>STATE</th>
<th>HOURLY RATE OR FLAT RATE</th>
<th>MAXIMUM FEE</th>
</tr>
</thead>
</table>
| Illinois [cont.] | • Gallatin County: $75<sup>573</sup>  
• Schuyler County: $60–65<sup>574</sup>  
• Mercer County: $65<sup>575</sup> | |
| Indiana<sup>576</sup> | Indiana requires counties to pay “reasonable fees.”  
Indiana Public Defender Commission Standards for Indigent Defense Services in Non-Capital Cases recommends not less than $90 per hour and notes in the commentary that “[t]he hourly rates currently paid to assigned counsel in Indiana range from $30–60 per hour, with the majority of counties using a rate of $40 per hour for out-of-court time and $50 per hour for in-court time.”<sup>577</sup> | |
| Iowa<sup>578</sup> | Hourly:  
• Class A Felony: $73  
• Class B Felony: $68  
• All other charges: $63 | The State Public Defender is required to establish fee limitations. They do this by limiting the number of hours an attorney can spend as follows:  
• Class A Felony: 258 hours ($18,834)  
• Class B Felony: 56 hours ($3,808)  
• Class C Felony: 30 hours ($1,890)  
• Class D Felony: 20 hours ($1,260)  
• Aggravated Misdemeanor: 20 hours ($1,260) | |

<sup>573</sup> Id. at 74–75.  
<sup>574</sup> Id. at 75–76.  
<sup>575</sup> Id. at 77.  
<sup>577</sup> IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES 13 (1995).  
<sup>578</sup> IOWA CODE § 13B.4 (2023); IOWA CODE § 815.7 (2023); JEFF WRIGHT, OFF. OF THE STATE PUB. DEF., REPORT OF IOWA’S INDIGENT DEFENSE SYSTEM 5–6 (2020).
<table>
<thead>
<tr>
<th>State</th>
<th>Hourly Rate or Flat Rate</th>
<th>Maximum Fee</th>
</tr>
</thead>
</table>
| Iowa [cont.] |  | • Serious Misdemeanor: 10 hours ($630)  
• Simple Misdemeanor: 5 hours ($315) |
| Kansas$^{579}$ | $80 per hour but the chief judge of any judicial district, or the Kansas Board of Indigent Defense Services, can lower the hourly rate. | • Nondrug felony cases of severity levels 1–5 and felony drug offenses with six or more hours in court that don’t go to trial: $1,600  
• Nondrug felony cases of severity levels 6–10 and felony drug offenses with fewer than six hours in court that don’t go to trial: $1,200  
• Nondrug felonies at severity level 5–10 that go to trial: $2,560  
• Nondrug felonies at severity level 4 and drug felonies at severity levels 2–5 that go to trial: $3,200  
• Nondrug felonies at severity levels 1–3 and drug felonies at level 1 that go to trial: $8,000 |
| Louisiana$^{580}$ | Uses flat fee contracts and some hourly payments (The statewide hourly median is $43.88 per hour.)$^{581}$ | None |
| Maine$^{582}$ | $150 per hour | • Class A Offense: $9,400  
• Class B & C Offense (against person): $7,500  
• Class B & C Offense (against property): $4,700  
• Class D & E Offense (punishable by under a year): $4,700 |

<table>
<thead>
<tr>
<th>STATE</th>
<th>HOURLY RATE OR FLAT RATE</th>
<th>MAXIMUM FEE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maryland</td>
<td>Maryland provides panel attorneys the same hourly rate as their federal counterparts, “[a]s the annual budget permits.” But the Maryland Office of the Public Defender currently pays $60 per hour for all cases except those involving a life sentence, where the rate is $75 per hour.</td>
<td>Maryland provides for the same maximums as federal panel attorneys for comparable cases where district court cases are treated similarly to federal misdemeanors and circuit court cases are treated similarly to federal felonies. The Maryland Office of the Public Defender has a $3,000 soft cap in all cases.</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>Hourly: - Homicide Cases: $110 - Non-homicide superior court cases: $75 - District court cases: $60</td>
<td>Annual billable cap of 1,650 hours total per attorney.</td>
</tr>
<tr>
<td>Michigan</td>
<td>Varies—some are paid hourly, per case, per case event, or through contracts. Hourly rates range from $33 per hour to over $100 per hour. <em>Oakland County</em>: - Arraignment (half-day): $260 - Arraignment (full-day): $520 - Misdemeanor Trial (half-day): $275 - Misdemeanor Trial (full-day): $525</td>
<td>The 43rd District Court in Hazel Park caps its hourly arraignment rate of $100 per hour at a maximum of four hours.</td>
</tr>
</tbody>
</table>

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583. See MD. CODE ANN., CRIM. PROC. § 16-207 (LexisNexis 2022); MD. CODE REGS. § 14.06.02.06 (2023).


586. MASS. GEN. LAWS ch. 221D, §§ 11(a)–(b) (2022).

587. SIEGEL, supra note 368, at 11.

588. *SIXTH AMEND. CTR., THE RIGHT TO COUNSEL IN OAKLAND COUNTY, MICHIGAN: EVALUATION OF TRIAL-LEVEL INDIGENT DEFENSE SERVICES IN ADULT CRIMINAL CASES* 76, 78 (2022) [hereinafter OAKLAND COUNTY REPORT], https://sixthamendment.org/6AC/6AC_MI_OaklandCountyReport_10272022.pdf [perma.cc/3GPP-UWG7].

589. OAKLAND COUNTY REPORT, supra note 588, at 76 n.230.
<table>
<thead>
<tr>
<th>STATE</th>
<th>HOURLY RATE OR FLAT RATE</th>
<th>MAXIMUM FEE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Michigan [cont.]</td>
<td>$130.03 per hour for felonies, and $141.82 per hour for life offenses.(^{590})</td>
<td></td>
</tr>
<tr>
<td>Mississippi(^{591})</td>
<td>Judge approves amount of compensation.</td>
<td>$1,000 for circuit court cases $200 for cases that do not get appealed and do not originate in a court of record</td>
</tr>
<tr>
<td>Missouri(^{592})</td>
<td>Flat fees:</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• $375 for a misdemeanor case</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• $750 for a CDE Felony</td>
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</tr>
<tr>
<td></td>
<td>• $6,000 for a homicide (not first degree)</td>
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</tr>
<tr>
<td></td>
<td>• $10,000 for a first degree murder</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Additional payments if a case goes to trial</td>
<td></td>
</tr>
<tr>
<td>Montana(^{593})</td>
<td>$45 per hour for travel $56 per hour for professional time</td>
<td></td>
</tr>
<tr>
<td>Nebraska(^{594})</td>
<td>(Varies by county)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• In Nebraska District Courts, the range is $70–125; $95 is the most common rate</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• In Nebraska County Courts, the range is $50–125; $95 is the most common rate</td>
<td></td>
</tr>
</tbody>
</table>

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592. See STATE OF MO. PUB. DEF. COMM’N, supra note 464, at 28.


<table>
<thead>
<tr>
<th>State</th>
<th>Hourly Rate or Flat Rate</th>
<th>Maximum Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nevada 595</td>
<td>$100 per hour, but the government can contract for less.</td>
<td>• Felony Punishable by Life: $20,000</td>
</tr>
<tr>
<td></td>
<td>Different counties also make extensive use of fixed-fee contracts. 596</td>
<td>• Other Felony or Gross Misdemeanor: $2,500</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Misdemeanor: $750</td>
</tr>
<tr>
<td>New Hampshire 597</td>
<td>• $125 per hour for major crimes (homicide, felony sexual assault, first-degree assault)</td>
<td>• Misdemeanors: $2,000</td>
</tr>
<tr>
<td></td>
<td>• $90 per hour for other crimes</td>
<td>• Homicide: $20,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Felony Sexual Assault &amp; First Degree Assault: $12,500</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Other felonies: $5,500</td>
</tr>
<tr>
<td>New Jersey 598</td>
<td>$60 per hour in court</td>
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<tr>
<td></td>
<td>$50 per hour out of court</td>
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<tr>
<td></td>
<td>$252 per full day</td>
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<tr>
<td>New Mexico 599</td>
<td>Flat fees:</td>
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</tr>
<tr>
<td></td>
<td>• Misdemeanor: $180</td>
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<tr>
<td></td>
<td>• Fourth degree felony: $540</td>
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<tr>
<td></td>
<td>• Third degree felony: $595</td>
<td></td>
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<tr>
<td></td>
<td>• Second degree felony: $650</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• First degree felony: $700</td>
<td></td>
</tr>
<tr>
<td>New York 600</td>
<td>$158 per hour</td>
<td>$10,000</td>
</tr>
<tr>
<td>North Carolina 601</td>
<td>Hourly rates:</td>
<td>None</td>
</tr>
<tr>
<td></td>
<td>• Capital and life-without-parole cases: $100</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Class B1-D felonies: $85</td>
<td></td>
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<tr>
<td></td>
<td>• Low-level felonies (Class E-I): $65</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• DWI &amp; Class A1 misdemeanors: $65</td>
<td></td>
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</table>

599. Carroll, supra note 553.
<table>
<thead>
<tr>
<th>STATE</th>
<th>HOURLY RATE OR FLAT RATE</th>
<th>MAXIMUM FEE</th>
</tr>
</thead>
<tbody>
<tr>
<td>North Carolina [cont.]</td>
<td>2017 pilot flat-fee contract rates$^{602}$:</td>
<td></td>
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<tr>
<td></td>
<td>• Class A–D felonies: $425</td>
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<tr>
<td></td>
<td>• Other felonies: $230</td>
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<tr>
<td></td>
<td>• DWI: $300</td>
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<tr>
<td></td>
<td>• Class A1 misdemeanors: $200</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Class 1–3 Misdemeanors &amp; Traffic: $185</td>
<td></td>
</tr>
<tr>
<td>North Dakota$^{603}$</td>
<td>$75 per hour</td>
<td>Misdemeanor: $300</td>
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<tr>
<td></td>
<td></td>
<td>Felony: $575</td>
</tr>
<tr>
<td>Ohio$^{604}$</td>
<td>Varies by county and ranges from $30 per hour to $80 per hour</td>
<td>Ranges from $1,000 to $25,000 depending on county and charge</td>
</tr>
<tr>
<td>Oklahoma$^{605}$</td>
<td>Flat fee contracts in many places; otherwise:</td>
<td>Misdemeanor: $800</td>
</tr>
<tr>
<td></td>
<td>• $80 per hour for in-court services</td>
<td>Felony: $3,500</td>
</tr>
<tr>
<td></td>
<td>• $60 per hour for out-of-court services</td>
<td></td>
</tr>
<tr>
<td>Oregon$^{606}$</td>
<td>$75 per hour</td>
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</tr>
</tbody>
</table>

Flat rates in Eugene Municipal Court$^{607}$:
- Traditional (“non-specialty”) court case: $290
- DUI Diversion: $290
- Mental Health Court: $290
- Problem Solving Docket: $325
- Withdrawal: $145

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604. See County Rate and Maximum Fee Information, Off. of the Ohio Pub. Def. (Aug. 8, 2020), https://analytics.das.ohio.gov/t/PUBPUB/views/OhioFeeSchedulesStory3/Story1?frameSizedToWindow=true&:embed=y&:showAppBanner=false&:display_count=no&:showVizHome=no&:render=true [perma.cc/MGV5-P5F7].
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<tr>
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</thead>
<tbody>
<tr>
<td>Oregon [cont.]</td>
<td>- Community Court, all services: flat annual rate of $118,320</td>
<td></td>
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<tr>
<td>Pennsylvania</td>
<td></td>
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<td></td>
<td><strong>Philadelphia</strong>608:</td>
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<tr>
<td></td>
<td>- First Degree Crimes: $1,200 flat fee for trial preparation. If case goes to trial, attorney gets $225 for three hours or less of court time in a day and $450 per day for more than three hours court time in a given day.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Lesser Felonies: $750 flat fee for trial preparation. If case goes to trial, attorney gets $225 for three hours or less of court time in a day and $450 per day for more than three hours court time in a given day.</td>
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<td></td>
<td>- Misdemeanors: $450 flat fee</td>
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<tr>
<td></td>
<td>- Noncapital Homicide Cases: flat fee of $3,500 for preparation. During trial, attorneys are paid $300 for three hours or less of court time and $600 per day for more than three hours in a given day.</td>
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</tr>
<tr>
<td>Allegheny County (including Pittsburgh) (flat fees)609:</td>
<td></td>
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<tr>
<td></td>
<td>- Preparation for serious felonies (rape, robbery, child abuse): $1,500</td>
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<td></td>
<td>- All other cases: flat fee of $500</td>
<td></td>
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<td></td>
<td>- Preliminary hearings: flat fee of $250</td>
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<tr>
<td></td>
<td>- Trial (half day): flat fee of $250</td>
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</tr>
<tr>
<td></td>
<td>- Trial (full day): flat fee of $500</td>
<td></td>
</tr>
<tr>
<td>Rhode Island610</td>
<td>Superior Court (hourly):</td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Murder: $100</td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Class 1 Felony: $90</td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Class 2 Felony: $60</td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Misdemeanor: $50</td>
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</tr>
<tr>
<td></td>
<td>Superior Court:</td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Murder: $30,000</td>
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</tr>
<tr>
<td></td>
<td>- Class 1 Felony: $10,000</td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Class 2 Felony: $5,000</td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Misdemeanor: $1,500</td>
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</tbody>
</table>

609. Gideon at 50, supra note 50, at 29.
<table>
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<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>Rhode Island [cont.]</td>
<td>District Court (hourly):</td>
<td>District Court:</td>
</tr>
<tr>
<td></td>
<td>• Class 1 Felony: $90</td>
<td>• Class 1 Felony: $10,00</td>
</tr>
<tr>
<td></td>
<td>• Class 2 Felony: $60</td>
<td>• Class 2 Felony: $5,00</td>
</tr>
<tr>
<td></td>
<td>• DUI: $50</td>
<td>• DUI: $2,50</td>
</tr>
<tr>
<td></td>
<td>• Misdemeanor: $60</td>
<td>• Misdemeanor: $1,80</td>
</tr>
<tr>
<td>South Carolina$611</td>
<td>$40 per hour out of court</td>
<td>Felonies: $3,500</td>
</tr>
<tr>
<td></td>
<td>$60 per hour in court</td>
<td>Misdemeanors: $1,00</td>
</tr>
<tr>
<td>South Dakota$612</td>
<td>$107 per hour</td>
<td></td>
</tr>
<tr>
<td>Tennessee$613</td>
<td>Not to exceed $50 per hour</td>
<td>• Misdemeanors: $1,000 ($2,000 with petition that the case was extraordinary)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Class A or B Felony and first Degree Murder: $3,000 ($6,000 with petition that the case was extraordinary, first degree murder may qualify for more)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Other felonies: $2,000 ($4,000 with petition that the case was extraordinary)</td>
</tr>
<tr>
<td>Texas</td>
<td>(Varies from flat fee to hourly by county)</td>
<td>For nontrial, in-court work in Harris County$615:</td>
</tr>
<tr>
<td></td>
<td>* Armstrong, Potter, and Randall Counties$614:</td>
<td>• First Degree: $1,275</td>
</tr>
<tr>
<td></td>
<td>• OPTION ONE:</td>
<td>• Second Degree: $820</td>
</tr>
<tr>
<td></td>
<td>- $500 flat rate for misdemeanor/state jail felony plea</td>
<td>• Third Degree: $465</td>
</tr>
<tr>
<td></td>
<td>- $700 flat rate for third degree felony plea</td>
<td>For nontrial, out-of-court work in Harris County:</td>
</tr>
<tr>
<td></td>
<td>- $1,000 flat rate for second degree felony plea</td>
<td>• First Degree: $2,400</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Second Degree: $1,140</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Third Degree: $750</td>
</tr>
</tbody>
</table>

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614. TEXAS REPORT, supra note 85, at 149.
615. HARRIS COUNTY DISTRICT COURTS TRYING CRIMINAL CASES: FAIR DEFENSE ACT ALTERNATIVE PLAN FOR APPOINTMENT OF COUNSEL TO INDIGENT DEFENDANTS: FEE SCHEDULE 3 (2019).
## Table: Indigent Defense Fees by State

<table>
<thead>
<tr>
<th>State</th>
<th>Hourly Rate or Flat Rate</th>
<th>Maximum Fee</th>
</tr>
</thead>
</table>
| Texas [cont.]          | - $1,500 flat rate for first degree felony plea  
                          - PLUS:  
                            o $1,200 per full-day for contested trial  
                            o $600 per half-day for contested trial  
                          - OR OPTION TWO (hourly):  
                            - $150 for first/second degree list  
                            - $100 for state jail/third degree list  
                            - $75 for misdemeanor list  
                          - or (flat):  
                            - Guilty Plea: $200–300 flat rate  
                            - Dismissal by State: $100–200 flat rate  
                            - Nonjury trial/contested hearings: $60–80 per hour in court/$30–60 per hour out of court  
                            - Jury trial: $500–750 per full day in court; $30–50 per hour out of court  
                          - Duvall, Jim Hogg, & Starr Counties:
                           - Misdemeanor: $1,000  
                           - Noncapital felony: $3,500  
 |                        |                                                                                           | Until 2019:                                                                  |
| Utah 617               | Uses many flat-fee contracts as well as hourly compensation                               | - Misdemeanor: $1,000  
                          - Noncapital felony: $3,500  
 | Vermont 619            | $100 per hour                                                                              | Misdemeanor: $1,000  
                          - Life Felonies/Capital Cases: $25,000  
                          - Other Major Felony: $5,000  
                          - Minor Felonies: $2,000  
 | Virginia 620           | $90 per hour                                                                               | District Court (except Class 1 felony preliminary hearings): $120 (may waive and add an additional $120 when necessary) |

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616. Duval, Jim Hogg, and Starr District Court and County Court Plan Fee Schedule, supra note 14.
617. Sixth Amendment Center Utah Report, supra note 59, at vi, 45.
618. See id. (noting that these caps were repealed in 2019 and not replaced with a new statute).
<table>
<thead>
<tr>
<th>STATE</th>
<th>HOURLY RATE OR FLAT RATE</th>
<th>MAXIMUM FEE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Virginia [cont.]</td>
<td></td>
<td>Circuit court:</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Felony punishable by more than twenty years (except Class 1 felony): $1,235 (may waive and add an additional $850 when necessary)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Other, lower felonies: $445 (may waive and add an additional $155 when necessary)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Circuit Court Misdemeanors: $158</td>
</tr>
<tr>
<td>Washington (state)</td>
<td>(Varies by jurisdiction)</td>
<td>Pierce County:</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Class A Felony: $2,000 for nontrial; $7,500 for trial</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Class B or C Felony: $1,200 for nontrial; $3,000 for trial</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Misdemeanor: $900 for nontrial; $1,750 for trial</td>
</tr>
<tr>
<td></td>
<td>Seattle (hourly) by $621:</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Aggravated Murder: $97</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Class A Felony: $81</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Class B Life: $81</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Class B Felony: $70</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Class C Felony: $65</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Misdemeanor: $59</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Pierce County (hourly) $622:</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Class A+ Felony: $125</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Class A Felony: $80</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Class B or C Felony: $65</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Misdemeanor: $55</td>
<td></td>
</tr>
<tr>
<td>Washington, D.C. $623</td>
<td>$100 per hour</td>
<td>Misdemeanors: $2,000 for nontrial; $7,000 for trial</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• No cap on felony offenses where life in prison is possible</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• All other cases: $3,000</td>
</tr>
<tr>
<td>West Virginia $624</td>
<td>$60 per hour out of court</td>
<td></td>
</tr>
<tr>
<td></td>
<td>$80 per hour in court</td>
<td></td>
</tr>
</tbody>
</table>

621. [PERMA CC/BV84-X9BY].
622. [PERMA CC/4NQY-NJVF].
623. [PERMA CC/P883-FHJQ].
624. [LEXIS NEXIS].
<table>
<thead>
<tr>
<th>State</th>
<th>Hourly Rate or Flat Rate</th>
<th>Maximum Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wisconsin(^{625})</td>
<td>$70 per hour</td>
<td></td>
</tr>
<tr>
<td>Wyoming(^{626})</td>
<td>$100 per hour in court</td>
<td></td>
</tr>
<tr>
<td></td>
<td>$35–60 per hour out of court</td>
<td></td>
</tr>
<tr>
<td>Federal Criminal Justice Act panel attorneys(^{627})</td>
<td>$164 per hour</td>
<td>Misdemeanors: $3,600</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Felonies: $12,800</td>
</tr>
</tbody>
</table>

\(^{625}\) Wis. Stat. § 977.08(4m)(d) (2023).

\(^{626}\) Wyo. R. Crim. P. 44(e).

\(^{627}\) Guidelines for Administering the CJA and Related Statute, supra note 155, ch. 2, § 230.